COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. DAR-
Appeals Court. No. 16-P-1712

Roma, III, LTD.

Plaintiff-Appellee

v.

Charles W. Christopher, Frederick C. Frithsen, Lars-Erik Wiberg, Michael Bace, and Tacy D. San Antonio, as they are Members of the Town of Rockport Board of Appeals

Defendants-Appellants

On Appeal from a Judgment of the Land Court

Defendants-Appellants' Application for Direct Appellate Review (with Addendum)

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REQUEST FOR DIRECT APPELLATE REVIEW

The defendants-appellants, Members of the Town of Rockport Board of Appeals ("Town"), hereby request, pursuant to Mass.R.App.P. 11, direct appellate review of a decision of the Land Court dated October 19, 2016, granting summary judgment to plaintiff-appellee Roma, III, LTD and denying summary judgment to the Town.

PRIOR PROCEEDINGS

The plaintiff filed the Complaint underlying this matter on March 12, 2015 in the Land Court, appealing, pursuant to G.L. c. 40A, §17, a decision by the Town's Board of Appeals to affirm an order by the Town's Building Inspector that Ron Roma ("Roma"),[1] cease using his residential property to land his private helicopter, because the Town's Zoning Bylaw prohibits the use of any property in the Town for the landing of aircraft.

While the litigation was pending, the Appeals Court issued its decision in Hanlon v. Town of Sheffield, 89 Mass.App.Ct. 392 (2016), holding, for

[1] The plaintiff Roma, III, LTD. is a Florida Limited Partnership, which was formed to own property in Rockport on which Roma has built a single-family residence.

the first time, that G.L. c. 90, §39B, Fifth Paragraph, requires that any municipal regulation of "non-commercial private restricted landing areas" ("NCPRLAs") be approved by the Massachusetts Department of Transportation's Aeronautics Division (the "Division"). Hanlon held that the zoning bylaw of the Town of Sheffield was invalid, to the extent it prohibited the use of any land for the landing of aircraft, because it had not been approved by the Division. The Town of Sheffield, which had prevailed on this issue in the lower court proceedings, did not participate in the appeal and so had no standing to seek further appellate review.

Following issuance of the Hanlon decision, Roma filed an Amended Complaint in this matter, asserting that the Rockport Zoning Bylaw is invalid to the extent it prohibits the use of land for the landing of aircraft, because the Bylaw has not been approved by the Division. The parties filed Cross-Motions for Summary Judgment on that sole issue, and on October 19, 2016, the Land Court issued the decision under appeal, holding, pursuant to Hanlon, that the Town's Zoning Bylaw is invalid to the extent it prohibits NCPRLAs, because the Bylaw has not been approved by

the Division. (Addendum ("Add."), 12) However, the Land Court stated that it was "constrained" to decide this way, and noted that "[t]he Hanlon decision may merit revisiting," as the Appeals Court's analysis in the case "appears at odds with" a series of prior judicial decisions. (Add.23-24 and n.3)

Shortly after the Land Court issued its decision in this case, a different Judge of the Land Court, deciding precisely the same issue, also questioned the correctness of the Hanlon decision. See The Collings Foundation, et al. v. Stow Zoning Board of Appeals, 15 MISC 000369(Long, J.) (Add.38) The Town of Stow has filed a Notice of Appeal in that case.

STATEMENT OF RELEVANT FACTS

G. L. c. 90, §39B was initially enacted in 1946 and consisted of what are now the first, third, fourth and sixth paragraphs of the statute. The first and third paragraphs provide that no airport or "restricted landing area" may be maintained or operated without approval of the Division;[2] however, the fourth paragraph (hereafter, "Fourth Paragraph")

[2] The statute, which is included in the Addendum hereto at Page 10, actually references the Aeronautics Commission, whose powers and duties were transferred to the Division by the Legislature in 2009.

provides that "[t]his section shall not apply to restricted landing areas designed for non-commercial private use [i.e. NCPRLAs]," so long as any person constructing such a landing area so inform the Division. Thus, the statute exempted NCPRLAs from any requirement of Division approval. (The sixth paragraph states that the statute does not have retroactive effect.)

In 1985,[3] the statute was amended to add what is now the fifth paragraph (hereafter, "Fifth Paragraph"), which provides in relevant part:

> A city or town in which is situated the whole or any portion of an airport or restricted landing area owned by a person may ... make and enforce rules and regulations relative to the use and operation of aircraft on said airport or restricted landing area. Such rules and regulations ... shall be submitted to the [Division] and shall not take effect until approved by the [Division].

The Division interprets the Fifth Paragraph as requiring that any local regulation of any restricted landing area - including regulation of non-commercial, private landing areas - be approved by it. The Division submitted an Amicus Brief to the Appeals

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[3] In 1948, what is now the second paragraph of the statute was enacted, addressing the construction of airports and restricted landing areas on certain lakes and ponds.

Court in support of this position in the Hanlon appeal and presented oral argument to the Court in that case. As noted, the Appeals Court agreed that the exemption for NCPRLAs contained in the Fourth Paragraph does not apply to the requirement set forth in the Fifth Paragraph that local regulation of aircraft landing areas be approved by the Division.

The Town of Rockport's Zoning Bylaw, which as noted prohibits the use of any land for the landing of aircraft, was not submitted to the Division for review and approval.

ISSUE OF LAW RAISED BY THE APPEAL

By this appeal, the Town challenges the Appeals Court's determination in Hanlon that G.L. c. 90, §39B, Fifth Paragraph, requires Division approval of any local regulation of the use of land as NCPRLAs. More specifically, the Town challenges the Appeals Court's determination that the express exemption for NCPRLAs that is contained in the Fourth Paragraph of the statute applies only to the first three paragraphs of the statute, and not the Fifth Paragraph, which requires that the Division pre-approve local regulation of "an airport or restricted landing area."

This issue was raised and properly preserved in the lower court.

ARGUMENT

The Appeals Court acknowledged in Hanlon that its holding runs contrary to the most basic rule of statutory construction: that "the Legislature must be presumed to have meant what the words plainly say." Condon v. Haitsma, 325 Mass. 371, 373 (1950). The Court held that it was necessary to depart from this basic rule because the Fifth Paragraph of §39B is the only source from which cities and towns derive authority to regulate NCPRLAs, and, thus, applying the explicit exemption contained in the Fourth Paragraph of §39B for NCPRLAs to the Fifth Paragraph would deprive municipalities of any authority to regulate these areas at all, thereby "undermin[ing] the evident purpose of the statute." Hanlon, 89 Mass.App.Ct. at 392-93.

Although the Appeals Court did not state as such, necessarily implicit in its holding is a determination that any authority afforded cities and towns to regulate aircraft landing areas pursuant to their general authority to regulate the use of land under the Zoning Act, G.L. c. 40A, is preempted by state

law. The Division (in its Amicus Brief to the Court) expressly argued that implied preemption exists because the Division's authority to regulate aircraft landing areas is "comprehensive."

The Town submits that the above contentions (which were adopted by Roma in this case) are flawed, partly for the reasons that follow.[4]

A. Municipalities Have Authority to Regulate NCPRLAs Pursuant to Their Zoning Powers

First, the Town submits that the contention underlying Hanlon - that absent the Fifth Paragraph of §39B, cities and towns have no authority to regulate NCPRLAs - disregards prior appellate caselaw, which affirms the authority of cities and towns to regulate NCPRLAs pursuant to their zoning powers. See Harvard v. Maxant, 360 Mass. 432 (1971); Garabedian v. Westland, et al., 59 Mass.App.Ct. 427 (2003).

Specifically, in Maxant, 360 Mass. 432, the SJC affirmed an enforcement order issued pursuant to the Town of Harvard's zoning bylaw which, as in this case, prohibited a landowner from using his property to land

[4]Due to the space constraints imposed by Mass.R.App.P. 11, the Town does not include all its arguments herein, and abbreviates those that are included. The Town reserves the right to fully address all arguments raised in the proceedings below upon the briefing of this appeal.

aircraft. The Court did not recognize any limitation on the town's right to regulate the activity, or any conflict between the town's zoning authority and any authority the Division might have under §39B.

Further, 18 years after the Fifth Paragraph of §39B was enacted, the Court again upheld a town's right to ban the use of land for aircraft landings under its zoning bylaw, affirming an order issued pursuant to the bylaw that prohibited a landowner from expanding an airstrip on his property. See Garabedian, 59 Mass.App.Ct. 427. The Court recognized no requirement that local regulation be approved by the Division under §39B.

The holdings in Maxant and Garabedian, affirming a municipality's authority under the Zoning Act to regulate NCPRLAs to the broadest extent possible (i.e., by banning them), undermine the determination in Hanlon that applying the exemption for NCPRLAs in the Fourth Paragraph to the provisions of the Fifth Paragraph "would eliminate the only statutory basis for a town's regulation of private noncommercial landing areas." Hanlon, 89 Mass.App.Ct. at 395. These cases also clearly establish that, at least prior to Hanlon, neither the SJC nor the Appeals Court believed

that local authority to regulate NCPRLAs under the Zoning Act is preempted by, or subjugated to, the Division's authority under Section 39B.

During the proceedings below in this case, Roma argued that Maxant and Garabedian are irrelevant because the cases do not address the precise issues of whether local authority over aircraft landing areas is preempted, and whether §39B requires Division approval of local regulation over NCPRLAs. This objection takes too narrow a view of the Town's argument. As noted, Hanlon based its decision on a determination that no authority exists for cities and towns to regulate NCPRLAS, other than the Fifth Paragraph of §39B. But Maxant and Garabedian, one decided before enactment of the Fifth Paragraph and one decided after, explicitly stand for the proposition that cities and towns have authority to regulate these areas pursuant to their zoning powers. Thus, they contravene the theory that the Fifth Paragraph was necessary to fill a void in local authority.

Because appellate caselaw affirms the authority of cities and towns to regulate NCPRLAs under the Zoning Act, the Town submits that Hanlon's holding is in error and should be reviewed by this Court.

B. The Legislature Intended to Preserve Local Regulation of NCPRLAs

The Town further submits that Hanlon's holding that exempting local regulation of NCPRLAs from the requirement of Division approval would "undermine the evident purpose of [G.L. c. 90, §39B]" (Hanlon, 89 Mass.App.Ct. at 392-93), disregards a significant event in the enactment of the Fifth Paragraph which evinces a legislative intent to preserve the authority of cities and towns to regulate NCPRLAs.

Specifically, it was the Division which submitted the proposed legislation that became the Fifth Paragraph of §39B in 1985. The original draft of its bill was identical to the Fifth Paragraph that appears in the statute now, except that it began with the phrase "[N]otwithstanding any other provision in this section." (Add.41) Had this clause remained in the statute, it would have indisputably voided the language in the Fourth Paragraph, stating that "this section" shall not apply to NCPRLAs, with respect to the requirement in the Fifth Paragraph that the Division approve local regulation of restricted landing areas; however, the clause was excised from the bill before it was voted into law.

The removal of the "notwithstanding" clause evinces a legislative intent that the exemption for NCPRLAs contained in the Fourth Paragraph *not* be negated with respect to the provisions of the bill that became the Fifth Paragraph of the statute; yet the Appeals Court did not address this very significant piece of legislative history in Hanlon.

The Division, in its Amicus Brief in Hanlon, dismissed the import of the removal of the clause because the phrase appears to have been removed by a legislative committee during Third Reading of the bill, without being reported to either house as an amendment, in contravention of legislative rules.

The Division's contention that the significance of the removal of the clause should be ignored because of this alleged procedural irregularity is contrary to the canon of statutory construction that a Court may not insert language into a statute simply because it determines the omission of such language was inadvertent. See Boylston Water Dist. v. Tahanto Regional Sch. Dist., 353 Mass. 81, 84 (1967) ("[i]f the omission was due to inadvertence, an attempt to supply it would be tantamount to adding to a statute a meaning not intended by the Legislature"); Mitchell v.

Mitchell, 312 Mass. 154, 161 (1942) ("[t]he argument of ... unintentional omission is not enough").

Moreover, the Division's contention that removal of the "notwithstanding" clause was inadvertent cannot be sustained because it rests on the exceedingly bold assumption that legislators either did not read the final version of the bill before voting it into law, and therefore were unaware of the change, or read it but did not understand the import of the change that had been made. A Court should not engage in such assumptions, as they challenge the very competency of the legislative system. A Court should, instead, presume that legislators read the bill, both before and after it was sent to Third Reading, and were not only aware of the removal of the "notwithstanding" clause but also understood the import of it: that the exemption in the Fourth Paragraph for NCPRLAs would apply to the Fifth Paragraph, preserving local authority to regulate NCPRLAs without Division review.

Finally, deeming removal of the "notwithstanding" clause as "inadvertent" requires brushing aside two additional canons of statutory construction: first, that in enacting amendments, the Legislature knows of the existing provisions of the statute, see Eastern

Racing Ass'n v. Assessors of Revere, 300 Mass. 578, 581 (1938); and, second, that the Legislature knows of the Court's prior decisions. See Waldman v. American Honda Motor Co., 413 Mass. 320, 323 (1992). In construing the relationship between the Fourth and Fifth Paragraphs of G.L. c. 90, §39B, a Court should presume that the Legislature knew not only of the exemption for non-commercial PRLAs contained in the Fourth Paragraph, but also of the SJC's decision in Maxant, *supra*, which affirmed the authority of cities and towns to regulate NCPRLAs under the Zoning Act.

If the multiple canons of statutory construction noted above are acknowledged, rather than ignored, then it is plain that, by removing the "notwithstanding" clause, the Legislature intended to preserve the preexisting authority of cities and towns to regulate NCPRLAs, without Division interference.

C. The Division Has No Authority to Regulate NCPRLAs

Finally, Hanlon's determination that the Division has supervisory authority over regulation of NCPRLAs is inconsistent with the Division's own regulations, and is not supported by the statutory provisions cited in the Hanlon opinion.

Specifically, the Division's own regulations implementing §39B provide, *inter alia*, that "no one may establish ... an airport, heliport or restricted landing area" without obtaining approval from the Division. See 702 CMR 5.01. (Add.43) However, the regulations exempt from this requirement "private restricted landing areas." See 702 CMR 5.02 (Id.)[5] "Private Restricted Landing Area" is defined as "[a] landing area that is used solely for non-commercial, private use by the owner or lessee of the landing area" - i.e., a NCPRLA. See 702 CMR 2.01 (Add.42)

The regulations do not vest the Division with any authority to approve a NCPRLA; rather, one who intends to use property for a NCPRLA need only notify the Division of the use. See 702 CMR 5.02 (Add.43) Thus, the contention that municipal authority over NCPRLAs is preempted or superseded by the authority over NCPRLAs that is vested in the Division, is belied by the Division's own regulations.

Further, Hanlon's reliance on certain provisions outside of §39B for the proposition that the

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[5] The reference to "5.02" in 702 CMR 5.02, rather than 5.01, is clearly a typographical error, as 5.02 does not contain any requirements for which there might be an exemption. (Add.42)

Legislature did not intend to vest regulatory authority over NCPRLAs in cities and towns, is misplaced. Specifically, the Court cited the "*general* supervision and control over aeronautics" that is vested in the Division by G.L. c. 90, §39 (emphasis added), and the mandate of G.L. c. 90, §40 that the Division "foster" aeronautics in the Commonwealth. Hanlon, 89 Mass.App.Ct. at 396. This language does not come close to that needed to meet the high standard required to establish preemption. See Bloom v. Worcester, 363 Mass. 136, 155 (1973) ("[t]he legislative intent to preclude local action must be clear"). If the Legislature had meant to vest superior or preemptive authority in the Division it would have used definitive language denoting as such, not ambiguous phrases such as "general" and "foster." Compare, e.g., G.L. c. 143, §94(d) (certification of acceptable methods of construction by state "shall be binding on all cities and towns").

Thus, the Town submits, Hanlon's conclusion that the Division has supervisory authority over the regulation of NCPRLAs is in error, and should be reviewed by this Court.

REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct appellate review of the issue raised by this case is appropriate because, first, in determining that G.L. c. 90, §39B limits municipal authority to regulate NCPRLAs, Hanlon announced a new legal proposition with which three different Land Court Judges have disagreed.[6] Further, as argued above and as noted by the Land Court Judge in this case, the proposition is at odds with prior appellate caselaw. Given that a significant number of lower court Judges deem Hanlon to depart from precedent, the issue raised by the case is appropriate for final determination by this Court.

Moreover, the proposition announced in Hanlon undermines the public interest that is served by municipal control over the use of land, an interest that exists in cities and towns statewide.

Specifically, "[t]he main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses." Enos v. Brockton, 354 Mass. 278, 280 (1968); see also Marinelli v. Bd. of Appeals of Stoughton, 440 Mass. 255, 260-61 (2003) (the

[6] See Hanlon v. Carmody, 23 LCR 181 (2015) (Speicher, J.); Roma v. Christopher, 15 MISC 000074 (Foster, J.); and Collings v. Tarnuzzer, 15 MISC 000369 (Long, J.).

"primary purpose of zoning is the preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods").

These interests are highly implicated by the use of land for NCPRLAs, which often occurs on lots located in the middle of residential neighborhoods or small commercial areas, and accommodates private individuals, whereas commercial and public landing areas (i.e. airports) are relegated to swaths of land specifically designated for such use, and typically serve the public.

These interests are also at variance with the mission of the Division, which is limited to promoting aeronautics, consistently with the interests of public safety. See G.L. c. 90, §40; (Add.45, ¶7) Despite its position that it has authority to review local regulation, the Division has established no criteria for such regulation, other than that it be consistent with the above-described mission. (Id.) The primary interests of zoning - compatibility, uniformity and stability of land uses - have no place on the Division's agenda and are subjugated to the Division's

interest in promoting the use of land to land aircraft.

Moreover, the Division itself has no ability to ensure that NCPRLAs are located in areas that are suitable for such use from a zoning perspective: as discussed, the Division does not review or approve applications for NCPRLAs; it merely registers the areas. As such, the Division has no authority to determine whether use of certain property as a non-commercial private landing area is at all compatible with the uses of the land around it (even if it had an interest in doing so).

Determinations as to whether land in a certain town, or in a certain district within a town, is suitable for the landing of aircraft, and if so, under what conditions, should be left to the legislative bodies authorized to enact local zoning laws (town meetings and city councils), which have greater knowledge of local conditions and the history and purpose of zoning laws in their communities. Hanlon wrests control over local interests away from those best suited to exercise it, and vests it in an agency with inconsistent interests. Whether that is

appropriate is a question that should be reviewed by this Court.

WHEREFORE, the Defendant-Appellant Rockport Board of Appeals respectfully requests that this Court grant Direct Appellate Review of the October 19, 2016 decision of the Land Court in this matter.

DEFENDANT-APPELLANT TOWN OF ROCKPORT BOARD OF APPEALS

By its attorney,

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CERTIFICATE OF SERVICE

I, Jackie Cowin, hereby certify that on the below date, I served a copy of the foregoing Application for Direct Appellate Review to the following counsel of record, through the Court's electronic filing system, and also by e-mail:

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Dated: January 10, 2017

Jackie Cowin

ADDENDUM **Page**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
Docket Report

15 MISC 000074

Roma, III, Ltd. v. Charles W. Christopher Member of the Rockport Board of Appeals et al FOSTER

CASE TYPE:	Miscellaneous	**FILE DATE:**	03/12/2015
ACTION CODE:	ZAC	**CASE TRACK:**	
DESCRIPTION:	ZAC - Appeal from Zoning/Planning Board, G.L. Chapter 40A, § 17		
CASE DISPOSITION DATE	10/19/2016	**CASE STATUS:**	Closed
CASE DISPOSITION:	Judgment entered.	**STATUS DATE:**	10/19/2016
CASE JUDGE:	Foster, Robert B.	**CASE SESSION:**	
PROPERTY ADDRESS:	129/133R Granite Street	**CITY/TOWN:**	Rockport

LINKED CASE

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Roma, III, Ltd.

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COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
Docket Report

Defendant Michael Bace Member of the Rockport Board of Appeals	**Private Counsel** 655880 Jackie A. Cowin KP Law, P.C. KP Law, P.C. 101 Arch Street Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 05/26/2016 **Private Counsel** 567354 Darren Robert Klein KP Law, P.C. KP Law, P.C. 101 Arch Street 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 04/29/2015 **Private Counsel** 634434 John Joseph Goldrosen Massachusetts Bar 22 Harton Ross Dr Whitman, MA 02382 Work Phone (617) 633-6492 Added Date: 04/29/2015
Defendant Charles W. Christopher Member of the Rockport Board of Appeals	**Private Counsel** 655880 Jackie A. Cowin KP Law, P.C. KP Law, P.C. 101 Arch Street Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 05/26/2016 **Private Counsel** 567354 Darren Robert Klein KP Law, P.C. KP Law, P.C. 101 Arch Street 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 04/29/2015 **Private Counsel** 634434 John Joseph Goldrosen Massachusetts Bar 22 Harton Ross Dr Whitman, MA 02382 Work Phone (617) 633-6492 Added Date: 04/29/2015

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
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Defendant Frederick C. Frithsen Member of the Rockport Board of Appeals	**Private Counsel** 655880 Jackie A. Cowin KP Law, P.C. KP Law, P.C. 101 Arch Street Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 05/26/2016 **Private Counsel** 567354 Darren Robert Klein KP Law, P.C. KP Law, P.C. 101 Arch Street 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 04/29/2015 **Private Counsel** 634434 John Joseph Goldrosen Massachusetts Bar 22 Harton Ross Dr Whitman, MA 02382 Work Phone (617) 633-6492 Added Date: 04/29/2015
Defendant Tacy D. San Antonio Member of the Rockport Board of Appeals	**Private Counsel** 655880 Jackie A. Cowin KP Law, P.C. KP Law, P.C. 101 Arch Street Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 05/26/2016 **Private Counsel** 567354 Darren Robert Klein KP Law, P.C. KP Law, P.C. 101 Arch Street 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 04/29/2015 **Private Counsel** 634434 John Joseph Goldrosen Massachusetts Bar 22 Harton Ross Dr Whitman, MA 02382 Work Phone (617) 633-6492 Added Date: 04/29/2015

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
Docket Report

Defendant	Private Counsel 655880
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FINANCIAL DETAILS

Date	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
03/12/2015	Land Court miscellaneous filing fee Receipt: 320311 Date: 03/12/2015	240.00	240.00	0.00	0.00
03/12/2015	Land Court surcharge Receipt: 320311 Date: 03/12/2015	15.00	15.00	0.00	0.00
	Total	**255.00**	**255.00**	**0.00**	**0.00**

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				

COMMONWEALTH OF MASSACHUSETTS
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INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
03/12/2015		Complaint filed.	
03/12/2015		Case assigned to the Fast Track per Land Court Standing Order 1:04.	
03/12/2015		Uniform Counsel Certificate for Civil Cases filed by Plaintiff.	
03/18/2015		Affidavit of Compliance with Notice requirements of Chapter 40A, Sec. 17 filed by Nicholas Preston Shapiro, Esq..	
03/31/2015		The case has been assigned to the F Track. Notice sent.	
03/31/2015		Event Scheduled Event: Case Management Conference Date: 04/29/2015 Time: 11:00 AM (Notice Sent to Jeffrey T. Angley, Esq.) Result: Event Rescheduled.	Foster
04/23/2015		Amended Complaint filed.	
04/23/2015		Event Resulted The following event: Case Management Conference scheduled for 04/29/2015 11:00 AM has been resulted as follows: Result: Event Rescheduled to May 8, 2015 at 11:00 am, per order of the court.	Foster
04/23/2015		Event Scheduled Event: Case Management Conference Date: 05/08/2015 Time: 11:00 AM Result: Case Management Conference held	
04/23/2015		Joint Case Management Conference Statement filed.	
04/29/2015		Appearance of John Joseph Goldrosen, Esq., Darren Robert Klein, Esq. for Charles W. Christopher Member of the Rockport Board of Appeals, Frederick C. Frithsen Member of the Rockport Board of Appeals, Lars-Erik Wiberg Member of the Rockport Board of Appeals, Michael Bace Member of the Rockport Board of Appeals, Tacy D. San Antonio Member of the Rockport Board of Appeals, filed	
05/08/2015		Case Management Conference Held The following event: Case Management Conference scheduled for 05/08/2015 11:00 AM has been resulted as follows: Result: Case management conference held. Attorneys Jeffrey Angley, Robert K. Hopkins, and John J. Goldrosen appeared. A citation for publication will issue on plaintiff's claim under G.L. c. 240, § 14A. Plaintiff will give notice to the Attorney General of its constitutional claims no later than May 15, 2015. Discovery was set to close September 30, 2015. A telephone conference call was scheduled for October 5, 2015 at 9:45 a.m. (Notice of docket entry sent to Attys. Angley, Hopkins, Shapiro, Klein, and Goldrosen)	Foster
05/12/2015		Scheduled Event: Telephone Conference Call Date: 10/05/2015 Time: 09:45 AM Result: Status Conference held.	

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05/15/2015	Citation by publication in the Gloucester Daily Times, returnable 07/06/2015, issued.	
06/04/2015	Tear Sheet of the publication of the Citation, filed.	
10/05/2015	Event Resulted The following event: Telephone Conference Call scheduled for 10/05/2015 09:45 AM has been resulted as follows: Result: Telephone conference call held. Attorneys Robert K. Hopkins and John Joseph Goldrosen appeared. Discovery has been extended to January 29, 2016. A further telephone conference call has been scheduled for January 29, 2016 at 9:45 A.M.	Foster
10/06/2015	Scheduled Event: Telephone Conference Call Date: 01/29/2016 Time: 09:45 AM (Notice sent to Attys. Angley, Shapiro, Hopkins, Klein, and Goldrosen) Result: Event Rescheduled.	
11/16/2015	Notice of Change of Address for Phillips & Angley, counsel for the Plaintiff, filed.	
01/27/2016	Assented-to Motion to Extend Discovery Deadline, filed.	
01/28/2016	Event Resulted The following event: Telephone Conference Call scheduled for 01/29/2016 09:45 AM has been resulted as follows: Result: Event Rescheduled to April 29, 2016 at 9:45 am.	Foster
01/29/2016	Assented-to Motion to Extend Discovery Deadline ALLOWED. Discovery Deadline extended to April 19, 2016. Telephone Status Conference set down for January 29, 2016 continued to April 29, 2016 at 9:45 am. (Notice of Docket Entry sent to Attys. Angley, Shapiro, Hopkins, Klein, and Goldrosen	Foster
02/02/2016	Scheduled Event: Telephone Conference Call Date: 04/29/2016 Time: 09:45 AM	
04/29/2016	Event Resulted The following event: Telephone Conference Call scheduled for 04/29/2016 09:45 AM has been resulted as follows: Result: Telephone conference call held. Attorneys Jeffrey T. Angley, Nicholas P. Shapiro, and John Joseph Goldrosen appeared. Plaintiff to file expert disclosures by August 15, 2016. Parties are free to confer about expert dispositions. Pretrial conference is scheduled for September 21, 2016 at 10:00 AM.	Foster
04/29/2016	Scheduled Event: Pre-Trial Conference Date: 09/21/2016 Time: 10:00 AM (Notice of Docket Entry sent to Attys. Angley, Shapiro, and Goldrosen)	Foster
05/16/2016	Plaintiff's Unopposed Motion for Leave to Amend the (First) Amended Complaint, filed.	
05/16/2016	Plaintiff's Request for a Telephone Status Conference, filed.	

COMMONWEALTH OF MASSACHUSETTS
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Docket Report

05/18/2016	Plaintiff's Unopposed Motion for Leave to Amend the (First) Amended Complaint, ALLOWED. Plaintiff shall file and serve Second Amended Complaint no later than May 25, 2016. A telephone status conference is set down for May 27, 2016 at 9:45 AM. (Notice of Docket Entry sent to Attys. Angley, Shapiro, Hopkins, Klein, and Goldrosen)	Foster
05/19/2016	Scheduled Event: Telephone Conference Call Date: 05/27/2016 Time: 09:45 AM (Notice sent to Attys. Angley, Shapiro, Hopkins, Klein, and Goldrosen)	Foster
05/20/2016	Second Amended Complaint, filed.	
05/25/2016	Event Resulted The following event: Telephone Conference Call scheduled for 05/27/2016 09:45 AM has been resulted as follows: Result: Event Rescheduled.	Foster
05/25/2016	Scheduled Event: Telephone Conference Call Date: 06/02/2016 Time: 10:00 AM	Foster
05/26/2016	Appearance of Jackie A. Cowin, Esq. for Charles W. Christopher Member of the Rockport Board of Appeals, Frederick C. Frithsen Member of the Rockport Board of Appeals, Lars-Erik Wiberg Member of the Rockport Board of Appeals, Michael Bace Member of the Rockport Board of Appeals, Tacy D. San Antonio Member of the Rockport Board of Appeals, filed	
06/02/2016	Event Resulted The following event: Telephone Conference Call scheduled for 06/02/2016 10:00 AM has been resulted as follows: Result: Telephone Status conference held. Attorneys Jeffrey Angley, Nicholas Shapiro, and Jackie Cowin appeared. Plaintiff will file motion for summary judgment on claim under G.L. c. 240, § 14A that Town's authority to regulate helicopter landing is governed by the decision in Hanlon v. Town of Sheffield, No. 15-P-799 (Mass. App. Ct. May 13, 2016). If judgment is entered in favor of plaintiff on this claim, the court anticipates staying or preserving plaintiff's other claims pending appeal. Plaintiff to file Motion for Summary Judgment by August 1, 2016. Reply briefs will be due September 9, 2016. Hearing is scheduled for Sept 15, 2016 at 10:00 AM. The deadline for expert disclosures is stayed. The Pre-Trial Conference is taken off the list until further order from the Court. (Notice of Docket Entry sent to Attorneys Jeffrey Angley, Nicholas Shapiro, John Goldrosen and Jackie Cowin)	Foster
06/03/2016	Scheduled Event: Summary Judgment Hearing Date: 09/15/2016 Time: 10:00 AM (Notice sent to Attorneys Jeffrey Angley, Nicholas Shapiro, John Goldrosen and Jackie Cowin)	Foster
07/27/2016	Assented to Motion to Extend Summary Judgment Briefing and Hearing Calendar, filed.	

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
Docket Report

07/29/2016	Assented to Motion to Extend Summary Judgment Briefing and Hearing Calendar, ALLOWED. Summary Judgment Motion to be filed by August 15, 2016; Oppositions due on September 15, 2016; Reply Briefs due on September 22, 2016. The Hearing on the Motion for Summary Judgment is continued to September 30, 2016 at 10:30 A.M. (Notice of docket entry sent to Attorneys Jeffrey Angley, Nicholas Shapiro, John Goldrosen and Jackie Cowin)	Foster
08/01/2016	Event Resulted The following event: Pre-Trial Conference scheduled for 09/21/2016 10:00 AM has been resulted as follows: Result: Case Taken Off of the List.	Foster
08/16/2016	Plaintiff's Motion for Summary Judgment, filed.	
08/16/2016	Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, filed.	
08/16/2016	Statement of Undisputed Material Facts in support of Plaintiff's Motion for Summary Judgment, filed.	
08/16/2016	Statement of Legal Elements in support of Plaintiff's Motion for Summary Judgment, filed.	
09/15/2016	Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, filed.	
09/15/2016	Memorandum in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, filed.	
09/15/2016	Combine Statement of Material Facts, filed.	
09/15/2016	Index of Additional Exhibit (submitted by Defendant), filed.	
09/15/2016	Statement of Legal Elements in Support of Defendant's Cross-Motion for Summary Judgment, filed.	
09/26/2016	Plaintiff's Reply Memorandum of Law in Support of Motion for Summary Judgment, filed.	
09/26/2016	Combined Statement of Material Facts, filed.	
09/26/2016	Supplemental Index with Affidavit of Ron Roma, filed.	
09/26/2016	Plaintiff's Motion to Strike Paragraph 23 of the Defendants' Statement of Additional Undisputed Material Facts, filed.	
09/29/2016	Defendant's Response to Plaintiff's Motion to Strike, filed.	
09/30/2016	Event Resulted The following event: Summary Judgment Hearing scheduled for 09/30/2016 10:30 AM has been resulted as follows: Result: Summary Judgment Hearing held. Attorneys Nicholas Shapiro and Jackie Cowin appeared. Paragraph 23 of the Defendants' Statement of Facts is STRUCK. Defendants' Motion to Supplement the Record is ALLOWED. Motion for Summary Judgment is taken under advisement. (Notice sent to Attorneys Nicholas Shapiro and Jackie Cowin)	Foster
10/19/2016	Memorandum and Order on Cross Motions for Summary Judgment, issued. (Copies Sent to Attorneys Nicholas P. Shapiro and Jackie A. Cowin)	Foster

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
Docket Report

10/19/2016	Judgment, issued. (Copies Sent to Attorneys Nicholas P. Shapiro and Jackie A. Cowin)	Foster
10/31/2016	Revised Index of Additional Exhibits Submitted by Defendant, filed.	
11/09/2016	Notice of Appeal by Charles W. Christopher Member of the Rockport Board of Appeals, Frederick C. Frithsen Member of the Rockport Board of Appeals, Lars-Erik Wiberg Member of the Rockport Board of Appeals, Michael Bace Member of the Rockport Board of Appeals, Tacy D. San Antonio Member of the Rockport Board of Appeals to the Appeals Court filed.	
11/10/2016	A Copy of a Notice of Appeal Filed on November 9, 2016 by Jackie Cowin, Esq. for Defendants Town of Rockport Board of Appeals Sent to Attorneys Jeffrey T. Angley, Nicholas P. Shapiro and Robert K. Hopkins.	
12/15/2016	Notice of Assembly of Record on Appeal sent to the Clerk of the Appeals Court.	
12/15/2016	Notice of Assembly of Record on Appeal sent to all counsel of record.	
12/23/2016	Case entered in the Appeals Court as Case No. 2016-P-1712.	

9 of 9

I HEREBY ATTEST AND CERTIFY ON January 10, 2017 THAT THE FOREGOING DOCUMENT IS A FULL ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY.

Deborah J. Patterson

DEBORAH J. PATTTERSON
RECORDER
LAND COURT

90:39B. Certificate of approval; municipal airport site or restricted landing area; application; hearing; issuance

Section 39B. Each city or town before acquiring any property within the commonwealth for the purpose of establishing, constructing, enlarging or improving thereon an airport or restricted landing area, shall apply to the commission for a certificate of approval of the site. Before granting a certificate of approval for an airport or restricted landing area, the commission may, and upon the request of a resident of such city or town shall, hold a public hearing in the city or town where such airport or restricted landing area is to be located and at least seven days' notice of such hearing shall be published by the commission in a newspaper of general circulation in such city or town. The commission may authorize one member or the director to hold such a hearing.

No such certificate of approval of a site for an airport or restricted landing area shall be issued by the commission if such airport or area is situated on any lake or pond outside the metropolitan area, unless such site has previously been approved by the mayor and city council of the city, or at an annual or special town meeting of the town, within which the same is located.

All airports, restricted landing areas, and air navigation facilities shall conform to plans and specifications approved by the commission and shall not be in conflict with the state airport plan and no such airport, restricted landing area or air navigation facility shall be maintained or operated unless a certificate of approval of the maintenance and operation thereof is granted and is continued in force by the commission; provided, that no such certificate of approval with respect to a restricted landing area or air navigation facility on which public funds have been expended shall confer an exclusive right for the use thereof.

This section shall not apply to restricted landing areas designed for non-commercial private use, nor to any airport, restricted landing area or other air navigation facility owned or operated within the commonwealth by the federal government; provided, that each person constructing or maintaining a restricted landing area for non-commercial private use shall so inform the commission in writing; and provided, further, that such person shall construct and maintain said restricted landing area in such manner as shall not endanger the public safety.

A city or town in which is situated the whole or any portion of an airport or restricted landing area owned by a person may, as to so much thereof as is located within its boundaries, make and enforce rules and regulations relative to the use and operation of aircraft on said airport or restricted landing area. Such rules and regulations, ordinances or by-laws shall be submitted to the commission and shall not take effect until approved by the commission.

All approvals or licenses of airports or restricted landing areas granted by the commission prior to the effective date of this section, shall remain in effect.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

ESSEX, ss

LAND COURT DEPARTMENT
NO. 15 MISC 000074 (RBF)

ROMA, III, LTD.,

Plaintiff,

v.

CHARLES W. CHRISTOPHER, FREDERICK C. FRITHSEN, LARS-ERIK WIBERG, MICHAEL BACE, and TACY D. SAN ANTONIO, as they are MEMBERS of the TOWN OF ROCKPORT BOARD OF APPEALS,

Defendants,

MEMORANDUM AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Roma, III, Ltd. (Roma) appeals the decision of the Town of Rockport Board of Appeals (Board), pursuant to G.L. c. 40A, § 17, upholding the Rockport building inspector's (Building Inspector) enforcement order enjoining Ron Roma (Mr. Roma) from landing his personal helicopter on Roma's property at 129 and 133R Granite Street in Rockport (Property). Roma asserts that the decision was arbitrary and capricious since the Town of Rockport Zoning Bylaw (Bylaw) does not regulate such use or, alternatively, it is an allowed accessory use of Mr. Roma's home. Roma also brings a claim under G.L. c. 240, § 14A, seeking a determination that, to the extent that the Bylaw provides an implied ban on the use of a helicopter to access a lawful use without rational basis, the Bylaw itself exceeds the constitutional limits of the Town of Rockport's (Town) police power, violating the Due Process and Equal Protection provisions of

the Federal and State Constitutions, as applied to Roma. Additionally, Roma seeks a determination that the Board is without authority to enforce any rule restricting Mr. Roma from using his helicopter at the Property since the Bylaw was not approved by the Aeronautics Division of the Massachusetts Department of Transportation as required by Paragraph 5 of G.L. c. 90, § 39B.

The Board argues that their decision was not arbitrary and capricious because the Building Inspector reasonably interpreted the Bylaw as prohibiting the use of a helicopter as either a principal use or a permissible accessory use to a residence within the applicable zoning district where the Property is located. Even if it was a permissible accessory use, the Board states that the helicopter use did not meet the second criterion under the Bylaw, that the use not be detrimental to the neighborhood. The Board urges the court to defer to its judgment as it was well-founded in both law and the facts of the case.

Both parties have moved for summary judgment. Based on the pleadings, evidence in the record, and taking into consideration the recent Appeals Court decision in *Hanlon v. Town of Sheffield*, 89 Mass. App. Ct. 392 (2016), for reasons explained more thoroughly below, Roma's Motion for Summary Judgment is ALLOWED and the Board's Motion for Summary Judgment is DENIED.

Procedural History

On March 12, 2015, Roma filed its Complaint, and on April 23, 2015 filed its Amended Complaint. On May 8, 2015, a case management conference was held. On May 16, 2016, Roma filed Plaintiff's Unopposed Motion for Leave to Amend the (First) Amended Complaint. The court allowed the Motion for Leave to Amend the (First) Amended Complaint on May 18, 2016. On May 20, 2016, Roma filed the Second Amended Complaint. The Second Amended

Complaint contained three counts: (I) Appeal of Board's Decision pursuant to G.L. c. 40A, § 17; (II) Declaratory Judgment pursuant to G.L. c. 240, § 14A on as-applied Constitutional Violations; and (III) Declaratory Judgment pursuant to G.L. c. 240, § 14A on State Statutory Preemption under G.L. c. 90, § 39B.

On August 16, 2016, Roma filed Plaintiff's Motion for Summary Judgment, Memorandum of Law in Support of Motion for Summary Judgment, Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment, and Statement of Legal Elements in Support of Plaintiff's Motion for Summary Judgment. On September 15, 2016, the Board filed Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, Memorandum in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, Combined Statement of Material Facts (Def. Facts), Index of Additional Exhibit, and Statement of Legal Elements in Support of Defendant's Cross-Motion for Summary Judgment.

On September 26, 2016, Roma filed Plaintiff's Reply Memorandum of Law in Support of Motion for Summary Judgment, Combined Statement of Material Facts (Pl. Facts), Supplemental Index (Pl. Exh.) with Affidavit of Ron Roma (Roma Aff.), and Plaintiff's Motion to Strike Paragraph 23 of the Defendants' Statement of Additional Undisputed Material Facts. On September 29, 2016, the Board filed Defendant's Response to Plaintiff's Motion to Strike. On September 30, 2016, a hearing on the cross-motions for summary judgment was held. The court allowed Plaintiff's Motion to Strike Paragraph 23 of the Defendants' Statement of Additional Undisputed Material Facts and allowed Defendant's Motion to Supplement the Record. The Motions for Summary Judgment were taken under advisement. This Memorandum and Order follows.

Summary Judgment Standard

Generally, summary judgment may be entered if the "pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). In viewing the factual record presented as part of the motion, the court draws "all logically permissible inferences" from the facts in favor of the non-moving party. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). "Summary judgment is appropriate when, 'viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.'" *Regis College v. Town of Weston*, 462 Mass. 280, 284 (2012), quoting *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

Undisputed Facts

The following facts are undisputed or admitted for the purpose of summary judgment. To aid understanding, the statutory and regulatory context underlying some of the facts is included.

1. Plaintiff Roma, III, Ltd. (Roma) is a Florida Limited Partnership, with a principal place of business at 5100 W. Lemon Street, Suite 311, Tampa, FL. Pl. Facts, ¶ 1; Def. Facts, ¶ 1.

2. Roma is the owner of property located at 129 and 133R Granite Street in Rockport (Property). Pl. Facts, ¶ 2; Def. Facts, ¶ 2.

3. The Property consists of 1.62 acres of oceanfront property improved by a single-family residence that is currently under construction for Mr. Roma's family (Roma Home). The Property is located in a Residential A Zoning District (RA District). Pl. Facts, ¶ 3; Def. Facts, ¶ 3; Pl. Exh. C, Exh. 2; Roma Aff., ¶¶ 4-5.

4. Section III.B of the Bylaw, the Table of Permitted Uses, allows single-family residences in the RA District. Pl. Exh. C, Exh. 2; Roma Aff., ¶ 6.

5. After receiving a special permit and site plan approval from the Rockport Planning Board in 2013, the Roma Home is an as-of-right use and dimensionally authorized under the Bylaw. Roma Aff., ¶¶ 7-11.

6. Mr. Roma obtained his license to operate helicopters in 2011. Since then, he regularly flies his personal helicopter to travel among his family's homes and to business and other engagements. Roma does not fly his helicopter for commercial purposes and typically flies the helicopter alone, or with a few passengers. Roma Aff., ¶¶ 13-16.

7. In September 2013, Roma sought a Federal Aviation Administration (FAA) determination of airspace suitability for a private helicopter landing area at the Property. By letter dated September 18, 2013, the FAA recognized the Property as a licensed private use heliport. Roma Aff., ¶ 17, Exhs. 1-2.

8. Roma also received an airspace review approval from the Massachusetts Department of Transportation, Aeronautics Division (Division), which provided that the Property did not require any permitting. Roma Aff., ¶ 18, Exh. 3.

9. On November 14, 2014, Mr. Roma flew his personal helicopter to the Property. Pl. Facts, ¶ 4; Def. Facts, ¶ 4; Roma Aff., ¶ 22.

10. On or about November 24, 2014, the Rockport Building Inspector issued an enforcement order (Order) stating in part:

> It has recently been brought to my attention that your property at 129 Granite Street, referenced above, has been the site of a helicopter landing on November 14, 2014. Your property is located in a Residential A Zoning District. A review of our zoning bylaws indicates that a heliport is not allowed, either as a principal use of the property or an accessory use, in any zoning district in the Town. The use of this property for the landing

> of a helicopter is a violation of Section III.B of the Town of Rockport Zoning Bylaw. It is, therefore, an order of this office that the landing of helicopters on the property be stopped immediately. Failure to comply with this order may result in fines of up to $300 per day.

Pl. Facts, ¶ 5; Def. Facts, ¶ 5; Pl. Exh. C, Exh. 3.

11. The Town has a restrictive Bylaw. Section I.B of the Bylaw provides that "[n]o parcel of land in any district shall be used for any purpose other than those authorized for the district in which it is located." There is no reference to the use or operation of aircrafts or regulation of private landing strips in the Table of Permitted Uses for the RA District, or anywhere else the Bylaw. Pl. Facts, ¶¶ 11-12; Def. Facts, ¶¶ 11-12; Pl. Exh. C, Exh. 2.

12. On or about December 18, 2014, Roma filed an appeal of the Order to the Board. Pl. Facts, ¶ 6; Def. Facts, ¶ 6.

13. On February 19, 2015, the Board held a public hearing on Roma's appeal of the Order. At the close of the hearing, the Board voted unanimously to deny Roma's appeal and uphold the Order. Pl. Facts, ¶¶ 7-8; Def. Facts, ¶¶ 7-8.

14. On February 25, 2015, the Board issued a written decision embodying the vote and providing its rationale for upholding the Order (Decision). In its Decision, the Board stated that "[n]owhere in the Town's Bylaw is helicopter use specified and is, therefore, not permitted." The Board further concluded that the use was not "allowed as a primary use" nor "as a by-right accessory use associated with the single-family use, without some form of approval, variance and/or special permit." Pl. Facts, ¶ 9; Def. Facts, ¶ 9; Pl. Exh. C, Exh. 4.

15. On March 12, 2015, Roma timely filed an appeal of the Board's Decision pursuant to G.L. c. 40A, § 17 in this court. Pl. Facts, ¶ 10; Def. Facts, ¶ 10; Pl. Exh. C, Exh. 5.

16. General Laws c. 90, §§ 35-52, provides the general legislative scheme for development and regulation of aircrafts and airports in the Commonwealth. General Laws c. 90,

§ 39, sets forth that the general purpose of carrying out the provisions of §§ 35-52 is for "the purpose of protecting and insuring the general public interests and safety . . . and for the purpose of developing and promoting aeronautics within the commonwealth." G.L. c. 90, § 39.

17. Paragraphs One through Three of Section 39B establish a procedure for approval by the Division of the establishment, construction, enlargement or improvement of airports or restricted landing areas by cities and towns, and provides generally that no such activity shall take place without a Certificate of Approval of the site by the Division. Paragraph 4 of Section 39B and the Division's regulations implementing G.L. c. 90, § 39B explicitly exempt from this requirement "private restricted landing areas."[1] Pl. Facts, ¶¶ 16-17; Def. Facts, ¶¶ 16-17; G.L. c. 90, § 39B; 702 CMR 5.01-5.03.

18. "Private Restricted Landing Area" (PRLA) is defined as a "landing area that is used solely for non-commercial, private use by the owner or lessee of the landing area." 702 CMR 2.01; Pl. Facts, ¶ 18; Def. Facts, ¶ 18.

19. The regulations require that one who intends to use his property for a non-commercial PRLA must notify the Division by completing a Notification Form which seeks no information about the property on which the use is to take place, other than its distance from nearby public airports and whether the area includes a structure that violates dimensional regulations for any structure within a specified distance of an airport. The Notification Form specifies that it is for PRLAs only. It does not require any inspection of the property by the Division nor any review or approval of the PRLA by the Division. Pl. Facts, ¶¶ 19-21; Def. Facts, ¶¶ 19-21; see 702 CMR 5.02(1).

[1] The court takes judicial notice of the Division's regulations pursuant to G. L. c. 30A, §6. See also Massachusetts Guide to Evidence §202(a).

20. On July 13, 2016, Roma filled out and submitted a Notification Form, notifying the Division of his intent to use the Property for an PRLA pursuant to G.L. c. 90, § 39B. Pl. Facts, ¶ 22; Def. Facts, ¶ 22; Roma Aff. ¶¶ 17-19, Exh. 4.

21. The Division interprets Paragraph 5 of G.L. c. 90, § 39B, as meaning that a municipality's attempt to rely upon its zoning bylaw to regulate any portion of an airport or restricted landing area owned by a person is permissible, but only if the bylaw has been submitted to and approved by the Division. The Division's position is that any bylaw "relative to the use and operation of aircraft" is unenforceable unless approved in writing by the Administrator of the Division. Paragraph 5 does not explicitly differentiate between commercial use and non-commercial private use. Pl. Facts, ¶ 13; Def. Facts, ¶ 13.

22. Since the most recent 1985 amendment to G.L. c. 90, § 39B, adding Paragraph 5, the Division (or its predecessor) has reviewed approximately 36 local laws regulating the operation and use of aircrafts, approving approximately 3 and denying approximately 11, with the remaining requests withdrawn or no action taken. Pl. Facts, ¶ 14; Def. Facts, ¶ 14.

23. The Division has established no criteria for its review of local regulations, other than that the regulation must be consistent with the Division's mission of promoting aeronautics consistently with the interest in public safety. Pl. Facts, ¶ 24; Def. Facts, ¶ 24.

24. The Town has not submitted the Bylaw for review and approval by the Division. Pl. Facts, ¶ 15; Def. Facts, ¶ 15.

Discussion

The outcome of this case turns on whether the decision reached by the Appeals Court in *Hanlon v. Town of Sheffield*, 89 Mass. App. Ct. 392 (2016), is controlling. Roma submits that it is. Roma argues that *Hanlon* is directly applicable, binding authority on the proper interpretation

of G.L. c. 90, § 39B and the legal effect of a municipality's failure to obtain approval from the Division, as required by Paragraph 5, before adopting a local bylaw regulating the use or operation of aircrafts on airports or restricted landing areas. Based on *Hanlon*, Roma claims such enforcement actions by towns must be annulled since they exceed municipal zoning authority and frustrate the legislative intent in § 39 aimed at "developing and promoting aeronautics within the commonwealth." Conversely, the Board asserts that Paragraph 4's express language exempts non-commercial PRLAs from the approval process required by Paragraph 5. Under this interpretation, municipalities retain the authority to establish bylaws that restrict or regulate the use of aircraft on non-commercial PRLAs without requiring prior approval from the Division. The Board maintains that the decision in *Hanlon*, while binding precedent, is not as clear cut as argued by Roma.

In *Hanlon*, the Appeals Court interpreted Paragraphs 4 and 5 of G.L. c. 90, § 39B. Paragraph 4 of Section 39B provides:

> This section shall not apply to restricted landing areas designed for non-commercial private use, not to any airport, restricted landing area or other air navigation facility owned or operated within the commonwealth by the federal government; provided, that each person constructing or maintaining a restricted landing area for nor non-commercial private use shall construct and maintain said restricted landing area in such manner as shall not endanger the public safety.

Paragraph 5 of Section 39B provides:

> A city or town in which is situated the whole or any portion of an airport or restricted landing area owned by a person may, as to so much thereof as is located within its boundaries, make and enforce rules and regulations relative to the use and operation of aircraft on said airport or restricted landing area. Such rules and regulations, ordinances or by-laws shall be submitted to the [Division] and shall not take effect until approved by the [Division].

G.L. c. 90, § 39B, fourth-fifth par. The Appeals Court was left to consider whether Paragraph 5, read in conjunction with Paragraph 4, permitted a municipality to ban non-commercial PRLAs

without requiring prior approval from the Division. *Hanlon*, 89 Mass. App. Ct. at 394. The plaintiff had registered his property with the FAA as a helipad, and also registered the property as a non-commercial PRLA with the Division. He neither sought nor received any approval from the town with respect to the PRLA. *Id.* at 393. The town bylaw stated that land may not be "used except as set forth in the . . . Table of Use Regulations," and further provided that "[a]ny . . . use of premises not herein expressly permitted is hereby prohibited." The Table of Use Regulations contained no mention of the operation of aircraft on non-commercial or private airfields. *Id.* The town building commissioner ordered the plaintiff to cease and desist from using the PRLA on his property since such use was not set forth in the bylaw. The plaintiff appealed the order to the town zoning board of appeals, which upheld the cease and desist order. The plaintiff appealed the zoning board's decision to the Land Court. The Land Court (Speicher, J.) affirmed the zoning board after finding that Paragraph 4 explicitly exempted PRLAs from Paragraph 5's requirement of the Division's approval of municipal bylaws or regulations intended to regulate PRLAs. *Hanlon v. Sheffield Zoning Bd. of Appeals*, 23 LCR 181, 184-185 (2015).[2] The Appeals Court, however, disagreed.

In interpreting the relevant provisions of the statute, the Appeals Court noted that the application of Paragraph 4 to Paragraph 5 of § 39B "creates a serious incongruity." *Id.* at 395. The court stated that Paragraph 5 was the only provision in the statute that refers to any municipal power to regulate private non-commercial landing areas. *Id.* While acknowledging that Paragraph 4 exempts non-commercial PLRAs from every provision contained in all six paragraphs of § 39B, whether the provision was enacted at the same time or decades later, the court determined that applying the exemption of Paragraph 4 to Paragraph 5 "would eliminate

[2] See also *Boch v. Edgartown Zoning Bd. of Appeals*, 23 LCR 175 (2015) (Speicher, J.) (also deciding that Paragraph 4 expressly exempted non-commercial PRLAs from the requiring Division approval of bylaws pursuant to Paragraph 5).

the only statutory basis for a town's regulation of private noncommercial landing areas." *Id.* To avoid interpreting the statute as declaring that there is no basis for any municipal regulation of non-commercial PLRAs, the court decided that Paragraph 4 only applied to the preceding three paragraphs, and not to Paragraph 5. *Id.* As a result of the Appeals Court's decision, any part of a town bylaw that purports to regulate "the use and operation of aircraft on [an] airport or restricted landing area" cannot take effect until "submitted to the [Division] and . . . until approved by the [Division]." *Id.* at 396-397.

This case is indistinguishable from *Hanlon*. As in *Hanlon*, the Town has a restrictive Bylaw that exempts all uses that are not authorized for the district in which it is located. The Bylaw makes no mention of non-commercial PRLAs. The Town did not seek approval of its restrictive Bylaw from the Division. The Building Inspector issued cease and desist orders in both cases, here, enjoining Mr. Roma from landing his personal helicopter on the Property, which the Board upheld. As such, there is no question that the holding in *Hanlon* is applicable to the present action.

The Board makes several arguments why summary judgment should enter in its favor despite the court's ruling in *Hanlon.* First, the Board contends that because the decision failed to discuss any authority afforded to municipalities to regulate the use of land under the Zoning Act, G.L. c. 40A, the argument that any zoning authority to regulate such areas is preempted by State law is flawed. Though G.L. c. 40, § 21 gives towns and cities the authority to make ordinances and bylaws, those ordinances may not be "repugnant to law." The concept of State law preemption was codified in Mass. Const. Amend. Art. 2, § 6:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, *which is not inconsistent with the*

> *constitution or laws enacted by the general court* in conformity with powers reserved to the general court by section eight . . . (emphasis added).

See *Boston Gas Co. v. City of Newton*, 425 Mass. 697, 699 (1997) ("Municipalities may not adopt by-laws or ordinances that are inconsistent with State law."). "From the wide scope of the purposes of the Zoning Act, it is apparent that the Legislature intended to permit cities and towns to adopt any and all zoning provisions which are constitutionally permissible, subject, however, to limitations expressly stated in that act or in other controlling legislation." *Sturges v. Town of Chilmark*, 380 Mass. 246, 253 (1980). "To determine whether a local ordinance is inconsistent with a statute, this court has looked to see whether there was either an express legislative intent to forbid local activity on the same subject." *Boston Gas. Co. v. City of Somerville*, 420 Mass. 702, 704 (1995). "Moreover, in some circumstances we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose." *Id.*

The Board also points to two prior appellate cases that they argue affirm the authority of municipalities to regulate PRLAs pursuant to their zoning powers. See *Town of Harvard v. Maxant*, 360 Mass. 432 (1971) (affirming enforcement order issued pursuant to bylaw that prohibited landowner from using his property to land aircraft since it was not a use that was "customarily incidental" to residential use of property); *Garabedian v. Westland*, 59 Mass. App. Ct. 427 (2003) (upholding town's right to ban extension of existing airstrip and building of proposed second hanger as not accessory uses to single-family residence). The decision in *Town of Harvard v. Maxant* involved a property owner who contended that landing an aircraft on his property was not expressly prohibited by the bylaw and was therefore permissive, and alternatively that the landing of an aircraft at his property comprised a lawful, accessory use to his residence. *Maxant*, 360 Mass. at 436-440. The SJC affirmed the town's cease and desist order

on the grounds that the private landing strip was not an accessory use of residential property. *Id.* at 439-440. In *Garabedian v. Westland*, decided in 2003 after the 1985 amendment, the issue was the town's ability to prevent the construction of a second hanger, expansion of an existing hanger, and the extension of an existing airstrip as non-accessory uses under the bylaw. *Garabedian*, 59 Mass. App. Ct. at 428-429. The Appeals Court upheld the town zoning board's denial of a permit for construction of the second hanger and expansion of the first airstrip based on finding that they did not qualify as accessory uses. *Id.* at 434-438. The court permitted the continued use of the existing hanger and airstrip because any action to stop such use was untimely pursuant to G.L. c. 40A, § 7. *Id.* at 436-437.

Finally, the Board points to the legislative history of Paragraph 5 of Section 39B. When the Division proposed the legislation that eventually became Paragraph 5 of § 39B, its original draft of the bill was identical to Paragraph 5 as it now appears except that it began with the phrase "notwithstanding any other provision in this section." The introductory phrase, however, was excised from the bill before it was voted into law. The Board argues that by removing the "notwithstanding" clause, the Legislature intended to preserve the preexisting authority of cities and towns to regulate non-commercial PRLAs without Division approval.

None of these arguments justifies this court's reaching a conclusion contrary to the clearly applicable holding of *Hanlon*. The Board's arguments boil down to asking the court to find that the Appeals Court got *Hanlon* wrong. Regardless of whether *Hanlon* was properly decided, this court is constrained to apply the holding of the appellate court to this case. Any argument that *Hanlon* was incorrectly decided must be left to the Appeals Court or the Supreme Judicial Court.[3]

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[3] The *Hanlon* decision may merit revisiting. The Appeals Court decided *Hanlon* without the benefit of argument from the Town of Sheffield, which did not file a brief or appear at oral argument. The analysis in *Hanlon* appears at

Accordingly, *Hanlon* is binding authority on the proper interpretation of G.L. c. 90, § 39B and the legal effect of a municipality's failure to seek approval from the Division prior to adoption of a local bylaw that regulates the use and operation of aircrafts on non-commercial PRLAs. Since Paragraph 5 is directly applicable under the circumstances of this case, the Board's Decision and the Building Inspector's cease and desist Order are invalid because the Bylaw's implicit ban on the use of private aircrafts and non-commercial PRLAs has not been approved by the Division. Because the Board lacked authority to enforce any regulation restricting Mr. Roma's use of his helicopter at the Property, it need not be decided whether the Bylaw's implied ban on the use of a helicopter to access a lawful use, without rational basis, exceeded the constitutional limits of the Town's police power and violated the Due Process and Equal Protection provisions of the Federal and State Constitutions, as applied to Roma.

Conclusion

For the foregoing reasons, the Plaintiff's Motion to for Summary Judgment is ALLOWED, and Defendant's Motion for Summary Judgment is DENIED. Judgment shall enter annulling the Order and the Decision.

SO ORDERED
By the Court. (Foster, J).

Attest:

Deborah J. Patterson
Recorder

Dated: October 19, 2016

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

odds with the understanding of the statute implicit in a series of decisions in the Appeals Court, the Superior Court, and this court, including *Garabedian v. Westland*, 59 Mass. App. Ct. 427 (2003); *Boch v. Edgartown Zoning Bd. of Appeals*, 23 LCR 175 (2015); *Goddard v. Congregation of the Sisters of Saint Joseph*, 15 LCR 592 (2007); *Farrar v. Zoning Bd. of Appeals of Spencer*, No. 91-2430, 2004 Mass. Super. LEXIS 121 (Mass. Super. Mar. 16, 2004); and the decision overruled in *Hanlon*, *Hanlon v. Sheffield Zoning Bd. of Appeals*, 23 LCR 181 (2015).

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

ESSEX, ss

LAND COURT DEPARTMENT
NO. 15 MISC 000074 (RBF)

ROMA, III, LTD.,

Plaintiff,

v.

CHARLES W. CHRISTOPHER, FREDERICK C. FRITHSEN, LARS-ERIK WIBERG, MICHAEL BACE, and TACY D. SAN ANTONIO, as they are MEMBERS of the TOWN OF ROCKPORT BOARD OF APPEALS,

Defendants,

JUDGMENT

Plaintiff Roma, III, Ltd. (Roma) filed its complaint in this action on April 23, 2015. Roma's complaint is an appeal pursuant to G.L. c. 40A, § 17 and G.L. c. 240, § 14A, of the defendant Town of Rockport Board of Appeals February 25, 2015 decision (Decision) upholding the Town of Rockport Building Inspector's cease and desist order (Order) enjoining Ron Roma from landing his personal helicopter on Roma's property at 129 and 133R Granite Street in Rockport (Property). On August 16, 2016, Roma filed its Motion for Summary Judgment. On September 15, 2016, the Board filed its Opposition to Roma's Motion for Summary Judgment and its Cross-Motion for Summary Judgment. On September 26, 2016, Roma filed its Reply in Support of its Motion for Summary Judgment

The Cross-Motions for Summary Judgment came on to be heard on September 30, 2016. In a Memorandum and Order of even date, the court (Foster, J.) has allowed Roma's Motion for Summary Judgment and denied the Board's Motion for Summary Judgment.

In accordance with the court's Memorandum and Order issued today, it is

ORDERED, ADJUDGED and DECLARED that the Decision is hereby ANNULLED. It is further

ORDERED, ADJUDGED and DECLARED that the Order is hereby ANNULLED.

By the Court. (Foster, J).

Attest:

Deborah J. Patterson
Recorder

Dated: October 19, 2016

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

MIDDLESEX, ss.

THE COLLINGS FOUNDATION, THE COLLINGS FOUNDATION INC., ROBERT COLLINGS and CAROLINE COLLINGS, Plaintiffs, v. EDWARD TARNUZZER, CHARLES BARNEY, WILLIAM BYRON, BRUCE FLETCHER, RUTH KENNEDY SUDDUTH, MICHELLE SHOEMAKER, ANDREW DEMORE, LEE HERON and MARK JONES as members of the Stow Zoning Board of Appeals, Defendants.	CASE NO. 15 MISC. 000369 (KCL)
THE COLLINGS FOUNDATION, THE COLLINGS FOUNDATION INC., ROBERT COLLINGS and CAROLINE COLLINGS, Plaintiffs, v. EDWARD TARNUZZER, CHARLES BARNEY, WILLIAM BYRON, BRUCE FLETCHER, RUTH KENNEDY SUDDUTH, MICHELLE SHOEMAKER, ANDREW DEMORE, LEE HERON and MARK JONES as members of the Stow Zoning Board of Appeals, Defendants.	CASE NO. 15 MISC. 000370 (KCL)

DECISION

These above-captioned cases, presenting the same dispositive issue but not formally consolidated, are G.L. c. 40A, § 17 appeals of decisions by the Stow Zoning

Board of Appeals (the "ZBA") upholding an order of the town's building inspector directing the plaintiffs to cease-and-desist operations at the private airfield on their property on the ground that such use is not permitted under the town's zoning bylaw.[1] G.L. c. 90, § 39B requires a municipality to obtain the approval of the Aeronautics Division of the Massachusetts Department of Transportation ("Aeronautics Division") before regulating the use or operation of aircraft on airfields. Here, the bylaw prohibits airfields entirely, everywhere in the town, and the town applied for approval of that prohibition, which the Aeronautics Division denied. The plaintiffs have moved for summary judgment on the basis that the bylaw is thus invalid.[2] On the undisputed facts, as a matter of law, I agree with the plaintiffs and find and declare that the ZBA erred in upholding the cease-and-desist order. The ZBA's decision is vacated, and these matters are remanded back to the ZBA for a decision consistent with the findings set forth below.

Background

Summary judgment may be entered when the facts material to the claims at issue are not in genuine dispute and the moving party is entitled to judgment on those claims as a matter of law. Mass. R. Civ. P. 56(c); *Ng Bros. Constr., Inc. v. Cranney*, 436 Mass.

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[1] The two cases are appeals from separate aspects of the same ZBA decision (Aug. 31, 2015). Case No. 15 MISC 000370 (the order in which they were filed in this court reverses the order in which they were addressed by the board) is the plaintiffs' appeal of the board's refusal to overturn the building inspector's denial of their request for reconsideration of the cease and desist order. Case No. 15 MISC 00369 is the plaintiffs' appeal of the board's refusal to overturn the building inspector's denial of their request to stay the cease and desist order. Both present the same underlying issue — the validity of the cease and desist order itself — which the plaintiffs challenge on two bases: (1) that the ability of the airfield to operate is *res judicata* as a result of an earlier action between the parties, and (2) that regardless of *res judicata*, grandfathering, or anything else, the current town bylaw prohibiting the operation of airfields violates G.L. c. 90, § 39B because it has not been approved — indeed, it was explicitly rejected — by the Massachusetts Aeronautics Division of the Department of Transportation.

[2] The plaintiffs filed two separate motions for summary judgment. The first motion, filed on April 19, 2016, is premised on a theory of *res judicata*. The plaintiffs filed the second motion on June 20, 2016, premised on the invalidity of the bylaw prohibition itself, after the Appeals Court decided *Hanlon v. Town of Sheffield*, 89 Mass. App. Ct. 392 (2016). For the reasons stated herein, I deny the first motion, but grant the second.

638, 643-644 (2002). Except as otherwise noted, the following facts are not genuinely in dispute.

Airport and Landing Field Use under Stow's Zoning Bylaw

Airport and landing field use was allowed under Stow's zoning bylaw in a number of the town's zoning districts until 1982, when the bylaw was amended to delete it as a permitted use anywhere in the town. *See* Affidavit of Craig Martin, P.E. (not dated) ("Martin Affidavit") at 2, ¶¶ 5-6. Because uses not specifically named in the bylaw text are prohibited, airport and landing field use is thus unlawful. *See* Town of Stow Zoning Bylaw Including Amendments through May 12th, 2015 §3.10 ("Table of Principal Uses"). At some point after the 1982 amendment, the Town submitted the amended bylaw to the Aeronautics Division for review pursuant to G.L. c. 90, § 39B. *See* Affidavit of Robert Collings dated May 27, 2016 ("Collings Affidavit II") at 4, ¶ 8. By letter dated February 11, 2015, the Aeronautics Division indicated that it "does not approve the current Stow Zoning Bylaw to the extent that the Town seeks to regulate aviation activity within its boundaries." *See* Collings Affidavit II at Exhibit A. The Aeronautics Division subsequently reiterated its disapproval of the bylaw in a letter to the town administrator dated May 5, 2015, stating "in the opinion of the Aeronautics Division, any orders originating from this bylaw attempting to regulate aeronautical activity within the Town are invalid and unenforceable." *See* Collings Affidavit II at Exhibit B.

The Plaintiffs' Airfield

Plaintiffs Robert and Caroline Collings own and reside at the property at 137 Barton Road in Stow (the "Collings property"). *See* Collings Affidavit II at 1-2, ¶¶ 1 &

2. In 1977, Mr. and Mrs. Collings incorporated The Collings Foundation (the "Foundation"), a non-profit organization, with the announced purpose of "support[ing] 'living history' events involving transportation." Collings Affidavit II at 1, ¶ 2. The Foundation owns and operates an aviation museum in a 44,000-square-foot hangar that was built in 1985 on the Collings property. *See* Affidavit of Robert Collings dated April 13, 2016 ("Collings Affidavit I") at 2, ¶ 2. Adjacent to the museum, there is a grassy airfield that is 250 feet wide and 2,250 feet long. *See* Affidavit of Robert Collings dated April 13, 2016 ("Collings Affidavit I") at 2, ¶ 2; Collings Affidavit II at 2, ¶ 2. The Foundation owns the land on which the museum is located, and part of the land on which the airfield is situated. *See* Collings Affidavit I at 2 ¶ 2. Mr. and Mrs. Collings own the remaining airfield property, which they have leased to the Foundation. *See id.* The Foundation sub-leases that land, as well as its own portion of the airfield, to plaintiff The Collings Foundation, Inc. (the "Corporation").[3] *See id.*

There are a number of vintage aircraft in working-order condition on display in the aviation museum, including airplanes from World War II and before World War I. *See* Collings Affidavit II at 2, ¶ 3. The airfield is used in connection with the museum,[4] primarily to fly the aircraft out and back for inspection and maintenance and to maintain pilot proficiency in flying them, and has been registered annually with the Aeronautics Division as a non-commercial "private restricted landing area" ("PRLA") since 1984.[5]

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[3] The Corporation and Foundation are different organizations. The record suggests that the Foundation is more involved with the aviation museum and airfield at issue in this case than the Corporation, which appears to be focused on other Collings' endeavors. Why the ownership and operation of the museum and airfield is structured this way was not explained and, in any event, is immaterial to the resolution of this case.

[4] The registered airfield use on the Collings property thus commenced after the 1982 bylaw amendment. *See* Martin Affidavit at 2, ¶ 7.

[5] The defendants contend that, at least on occasion, the plaintiffs' use of the airfield is commercial rather than private, and thus outside the scope of a private landing field. Although the parties dispute the

See Collings Affidavit I at 2, ¶ 2; Collings Affidavit II at 2-4, ¶¶ 2-3 & 7; Affidavit of Rodger E. Burkley, Lt. Colonel, USAF (RET) (not dated) ("Burkley Affidavit") at 4, ¶ 20. Since 2002, the Foundation has also hosted three annual "living history events" at the airfield and museum, at which vintage aircraft are used in races and simulated aerial battles. *See* Collings Affidavit II at 2-3, ¶¶ 3-5. Visitors also have the opportunity to fly as passengers in the vintage planes, for a charge. *See* Collings Affidavit II at 3, ¶ 6; Martin Affidavit at 3, ¶ 13. The events draw thousands of paying visitors. *See* Martin Affidavit at 2, ¶ 10. None of this is popular with the neighbors, who object to the noise and disruption this causes.

On March 26, 2015, Stow's building inspector issued a cease-and-desist order prohibiting use of the airfield. *See* Collings Affidavit II at 2, ¶ 3. The town's ZBA subsequently upheld the cease-and-desist order in an August 31, 2015 written decision filed with the town clerk on September 2, 2015, relying on the bylaw's prohibition of airport or landing field use.[6] These cases are the plaintiffs' G.L. c. 40A, § 17 appeals of the ZBA's decision.[7]

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nature of the plaintiff's use of the airfield, that is not a material fact precluding summary judgment based on *Hanlon*. As set forth herein, a municipal regulation regarding the use of aircraft on airports or restricted landing areas is not enforceable unless approved by the Aeronautics Division. *See Hanlon*, 89 Mass. App. Ct. at 395-396.

[6] The plaintiffs contend that the ZBA's decision is barred by the doctrine of *res judicata* due to a prior action filed in 2003 in the Middlesex Superior Court (Case No. 03 CIV 3494E) regarding the use of their airfield (the "2003 case"). *See* Collings Affidavit I at 2-3, ¶7. As set forth herein, I find that there are genuine issues of material fact regarding the nature of the airfield use at issue in that case and in the present actions that preclude summary judgment based on *res judicata*. However, I rule on other grounds that summary judgment is warranted in these cases.

"'Res judicata' is the generic term for various doctrines by which a judgment in one action has a binding effect in another. It comprises 'claim preclusion' and 'issue preclusion.'" *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988). "A claim is the same for *res judicata* purposes if it is derived from the same transaction or series of connected transactions." *St. Louis v. Baystate Med. Center, Inc.*, 30 Mass. App. Ct. 393, 399 (1991).

> The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the [prior]

Further relevant facts are set forth in the Analysis section below.

Analysis

The plaintiffs contend that the ZBA's decision upholding the building inspector's cease-and-desist order must be vacated because the Aeronautics Division has not

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> action ... even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies. The doctrine...is based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit.

Heacock, 402 Mass. at 23 (internal quotations and citations omitted). "The invocation of claim preclusion requires three elements: (1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." *Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 843 (2005) (internal quotations omitted). For issue preclusion to apply:

> a court must determine that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication. Additionally, the issue decided in the prior adjudication must have been essential to the earlier judgment.

Id. at 843-844 (internal quotations and citations omitted).

In the 2003 case, neighbors of the Collings property, Carol and Mark Zarrow, appealed the ZBA's August 11, 2003 decision upholding the building inspector's decision against ordering all airplane takeoff and landing operations on the airfield to cease and desist. *See* Collings Affidavit I at 2-3, ¶¶ 3-7 & Exhibits A-E. Mr. and Mrs. Collings intervened in that action and filed an answer and counterclaim, asserting, *inter alia*, that the Foundation's use of the airfield was exempt from local zoning regulations pursuant to G.L. c. 40A, §3 (the "Dover Amendment"). *See* Collings Affidavit I at 3, ¶¶ 8-9 & Exhibits F-G. Mr. and Mrs. Collings filed a motion to dismiss the action on grounds that it was barred by laches, and that the airfield was a protected educational use under the Dover Amendment. *See* Collings Affidavit I at 3, ¶ 10 & Exhibit H. The defendant ZBA joined in and assented to the motion, which the Zarrows opposed and the court denied. *See* Collings Affidavit I at 3, ¶¶ 11-13 & Exhibits I-K. The ZBA and Mr. and Mrs. Collings then later filed a joint motion for summary judgment, which contended, *inter alia*, that the airstrip was exempt from zoning (1) as an educational use under the Dover Amendment, and (2) until the Massachusetts Aeronautics Commission approved the Town's bylaw under G.L. c. 90, §39B. *See* Collings Affidavit I at 3-4, ¶ 14 & Exhibits L & M. On November 30, 2004, the parties entered into a stipulation that stated . "[p]ursuant to Rule 41(a)(1)(ii) of the Massachusetts Rules of Civil Procedure, the Parties hereby stipulate that all of the claims made by the Plaintiffs in this action shall be dismissed. This dismissal is with prejudice and is intended to operate as an adjudication on the merits." *See* Collings Affidavit I at 4, ¶ 15 & Exhibit N.

According to Mr. Collings, the airfield has always been used exclusively in connection with and for the benefit of the Foundation's museum, and there was no material change in the airfield's use between the time of the 2003 case and the building commissioner's 2015 cease-and-desist order at issue in these cases. *See* Collings Affidavit I at 4, ¶ 16. The ZBA disagrees, contending that use of the airfield has changed substantially since the 2003 case. A number of local residents maintain that flights have increased in frequency and volume, and that activities at the airfield have been increasingly disruptive to the neighborhood. *See* Martin Affidavit at 4, ¶¶ 19-21; Burkley Affidavit at 2, ¶ 7; Affidavit of Donald P. Hawkes dated July 23, 2016 ("Burkley Affidavit") at 2, ¶ 12; Affidavit of Linda S. Cornell dated July 25, 2016 ("Cornell Affidavit") at 2, ¶¶ 9-10.

Whether the use at issue in the cases is the same is a disputed material fact that precludes summary judgment based on *res judicata*.

[7] *See* n.1, *supra*.

approved the bylaw (prohibiting airport and landing field uses) it is based on. The ZBA maintains that no such approval is required. As mandated by the holding in *Hanlon v. Town of Sheffield*, 89 Mass. App. Ct. 392 (2016), I find and rule that the plaintiffs are correct. The ZBA's decision is legally untenable, and thus must be vacated. *See Roberts v. Sw. Bell Mobile Sys., Inc.*, 429 Mass. 478, 485-486 (1999).

G.L. c. 90, §§ 35–52 governs the development and regulation of airports within the Commonwealth. Section 39 of c. 90 grants the Aeronautics Division[8] "general supervision and control over aeronautics." *Hanlon*, 89 Mass. App. Ct. at 395-396. The legislature vested the Aeronautics Division with such authority:

> [f]or the purpose of carrying out the provisions of sections thirty-five to fifty-two, inclusive, and for the purpose of protecting and insuring the general public interests and safety, and the safety of persons receiving instructions concerning, or operating or using, aircraft and of persons and property being transported in aircraft, and for the purpose of developing and promoting aeronautics within the commonwealth . . . .

G.L. c. 90, § 39. *See also* G.L. c. 90, § 40 (detailing purposes and powers of Aeronautics Division).[9] The Aeronautics Division's jurisdiction over aeronautics is broad, and includes the responsibility to enforce §§ 35–52 and "all orders, rules and regulations

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[8] The statute provides, "[t]he *commission* shall have general supervision and control over aeronautics." G.L. c. 90, § 39 (emphasis added). "Commission" is defined as "the Massachusetts aeronautics division." G.L. c. 90, § 35(m).

[9] The Aeronautics Division:

> shall foster air commerce and private flying within the commonwealth and for such purpose shall: (a) encourage the establishment of airports and air navigation facilities and the development of education in aeronautics; (b) make recommendations to the governor and to the general court as to necessary legislation or action pertaining thereto; (c) consult with the civil aeronautics administration and other agencies of the federal government in carrying forward research and development in aeronautics; (d) exchange with the said civil aeronautics administration and with other state governments through existing governmental channels information pertaining to civil air navigation.

G.L. c. 90, § 40.

made pursuant thereto and other laws of the commonwealth relating to aeronautics." [10] G.L. c. 90, § 40. *See Hanlon*, 89 Mass. App. Ct. at 395-396 (discussing "breadth of jurisdiction delegated to the [Aeronautics Division] by the Legislature").

G.L. c. 90, § 39B details the Aeronautics Division's authority over municipal regulation of airports and restricted landing areas,[11] as well as the establishment of, and

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[10] Under G.L. c. 90, § 40:

> The [Aeronautics Division] may (1) Co-operate with the federal government, and with any agency or department thereof, in the acquisition, establishment, construction, enlargement, improvement, protection, equipment, maintenance and operation of airports and other air navigation facilities within the commonwealth, and comply with the provisions of federal law, and any rules and regulations made thereunder, for the expenditure of federal funds for or in connection with such airports or other navigation facilities; (2) accept, receive and receipt for federal funds, and also other funds, public or private, for and in behalf of the commonwealth or as agent for any subdivision thereof, for the acquisition, establishment, construction, enlargement, improvement, protection, equipment, maintenance and operation of airports and other air navigation facilities within the commonwealth or such subdivisions, or jointly; provided that, if federal funds are received for such work, such funds shall be accepted upon such terms and conditions as may be prescribed by federal law and any rules and regulations made thereunder; (3) advise and co-operate with any political subdivision of this state or of any other state in all or any matters relating to aeronautics. For such purpose the commission may confer with, or hold joint hearings with, any federal or state aeronautical agency in connection with any provision of sections thirty-five to fifty-two, inclusive.
>
> The commission shall enforce sections thirty-five to fifty-two, inclusive, and all orders, rules and regulations made pursuant thereto and other laws of the commonwealth relating to aeronautics, and shall have and may exercise for any or all of such purposes such powers and authority as may be reasonably necessary therefor. Every state, county and municipal officer charged with the enforcement of laws in their respective jurisdiction shall assist and co-operate with the commission in such enforcement.

G.L. c. 90, § 40.

[11] An "airport" is:

> any area of land or water other than a restricted landing area, which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

G.L. c. 90, § 35(e).

A "restricted landing area" is "any area of land or water other than an airport which is used, or is made available, for the landing and take-off of aircraft; provided, that the use of such an area may be restricted from time to time by the commission." G.L. c. 90, § 35(f).

alteration to, such sites by municipalities.[12] The first three paragraphs of § 39B provide that a municipality may not establish or operate an airport or restricted landing area without a certificate of approval from the Aeronautics Division, and then set forth a

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[12] The statute provides:

> Each city or town before acquiring any property within the commonwealth for the purpose of establishing, constructing, enlarging or improving thereon an airport or restricted landing area, shall apply to the commission for a certificate of approval of the site. Before granting a certificate of approval for an airport or restricted landing area, the commission may, and upon the request of a resident of such city or town shall, hold a public hearing in the city or town where such airport or restricted landing area is to be located and at least seven days' notice of such hearing shall be published by the commission in a newspaper of general circulation in such city or town. The commission may authorize one member or the director to hold such a hearing.
>
> No such certificate of approval of a site for an airport or restricted landing area shall be issued by the commission if such airport or area is situated on any lake or pond outside the metropolitan area, unless such site has previously been approved by the mayor and city council of the city, or at an annual or special town meeting of the town, within which the same is located.
>
> All airports, restricted landing areas, and air navigation facilities shall conform to plans and specifications approved by the commission and shall not be in conflict with the state airport plan and no such airport, restricted landing area or air navigation facility shall be maintained or operated unless a certificate of approval of the maintenance and operation thereof is granted and is continued in force by the commission; provided, that no such certificate of approval with respect to a restricted landing area or air navigation facility on which public funds have been expended shall confer an exclusive right for the use thereof.
>
> This section shall not apply to restricted landing areas designed for non-commercial private use, nor to any airport, restricted landing area or other air navigation facility owned or operated within the commonwealth by the federal government; provided, that each person constructing or maintaining a restricted landing area for non-commercial private use shall so inform the commission in writing; and provided, further, that such person shall construct and maintain said restricted landing area in such manner as shall not endanger the public safety.
>
> A city or town in which is situated the whole or any portion of an airport or restricted landing area owned by a person may, as to so much thereof as is located within its boundaries, make and enforce rules and regulations relative to the use and operation of aircraft on said airport or restricted landing area. Such rules and regulations, ordinances or by-laws shall be submitted to the commission and shall not take effect until approved by the commission.
>
> All approvals or licenses of airports or restricted landing areas granted by the commission prior to the effective date of this section, shall remain in effect.

G.L. c. 90, § 39B.

procedure for obtaining that approval. *See* G.L. c. 90, § 39B, paras. 1-3. The two succeeding paragraphs of § 39B (the fourth and the fifth) are arguably incongruent. The fourth paragraph provides, in relevant part, "[t]his section shall not apply to restricted landing areas designed for non-commercial private use . . . ." G.L. c. 90, § 39B, para. 4 ("Paragraph Four"). The fifth paragraph, inserted by the legislature in 1985, decades after Paragraph Four was added in 1946, provides:

> A city or town in which is situated the whole or any portion of an airport or restricted landing area owned by a person may, as to so much thereof as is located within its boundaries, make and enforce rules and regulations relative to the use and operation of aircraft on said airport or restricted landing area. ***Such rules and regulations, ordinances or by-laws shall be submitted to the commission and shall not take effect until approved by the commission.***

G.L. c. 90, § 39B, para. 5 (emphasis added) ("Paragraph Five").[13] Thus, Paragraph Four, if read literally, seems to *exempt* non-commercial private restricted landing areas from the regulatory scheme in § 39B, while Paragraph Five, in seeming contradiction, requires Aeronautics Division approval of municipal regulations of such landing areas before those regulations can legally take effect.

The Appeals Court addressed this "serious incongruity" in *Hanlon*, by holding that Paragraph Four of § 39B does not apply to Paragraph Five. *See Hanlon*, 89 Mass. App. Ct. at 395-396. In *Hanlon*, the Town of Sheffield's zoning enforcement officer ordered the plaintiff to cease and desist use of the private landing strip on his property. *See id.* at 393. Because (as here) the town's zoning bylaw prohibited uses not expressly permitted therein and did not mention non-commercial or private airfields, such use was

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[13] "The language of the fifth paragraph applies to all landing facilities; it does not distinguish between commercial landing areas and private noncommercial landing areas." *Hanlon*, 89 Mass. App. Ct. at 394.

prohibited. *See id.* Sheffield, however, had never submitted the bylaw to the Aeronautics Division for approval. *See id.* The plaintiff appealed the town's zoning board of appeals' decision upholding the cease-and-desist order to the Land Court, which affirmed that decision and declared the bylaw valid. *See id.* 393-394.

The Appeals Court reversed the Land Court's decision, reasoning, "were we to apply the exemption of the fourth paragraph of § 39B to the fifth paragraph, it would eliminate the only statutory basis for a town's regulation of private noncommercial landing areas."[14] *Id.* at 395. To effectuate the legislature's intent to permit municipal regulation of such sites, subject to approval by the Aeronautics Division, the court interpreted the word "section" in Paragraph Four to refer to only those portions of § 39B in effect when that paragraph was added to the statute, but not to Paragraph Five, which was inserted decades later. *See id.* at 395-396. The court thus held that "any part . . . of the town zoning bylaw that purports to regulate 'the use and operation of aircraft on [an] airport or restricted landing area' cannot take effect until 'submitted to the [Aeronautics Division] and . . . until approved by the [Aeronautics Division].'" *Id.* at 396-397.

After *Hanlon*, the Land Court (Foster, J.) revisited § 39B in *Roma, III, Ltd. v. Christopher*, in which the plaintiff appealed the Town of Rockport's zoning board of appeals decision upholding the town's building inspector's order directing the plaintiff to

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[14] The Appeals Court further explained:

> The fifth paragraph is a legislative delegation to the division to approve or disapprove municipal ordinances and bylaws regulating an 'airport or restricted landing area owned by a person.' The statute as a whole contains no other provision that refers to any municipal power to regulate private noncommercial landing areas other than the language in § 39B, fifth par. The fifth paragraph allows for division review of such municipal rules and regulations, and thereby implies the permissibility of those rules and regulations in the first place.

Hanlon, 89 Mass. App. Ct. at 395.

stop using his property as a helicopter landing site. *See Roma, III, Ltd. v. Christopher*, Land Court Case No. 15 MISC 000074 (RBF), 2016 WL 6138651, at *3-*4 (Oct. 19, 2016). There, as here, the use of private aircraft and private landing areas was banned by the town's zoning bylaw. *See id.* at *8. Rockport, however, like Sheffield in *Hanlon*, had never submitted that bylaw to the Aeronautics Division for approval. *See id.* The Land Court held that the cease-and-desist order was invalid because the Aeronautics Division had not approved the town's bylaw, acknowledging that "*Hanlon* is binding authority on the proper interpretation of G.L. c. 90, § 39B and the legal effect of a municipality's failure to seek approval from the [Aeronautics] Division prior to adoption of a local bylaw that regulates the use and operation of aircrafts on non-commercial PRLAs."[15] *See id.*

I share my colleague's concerns about *Hanlon*,[16] but too am bound by its holding. Where, as here, a municipality's bylaw "purports to regulate the use and operation of aircraft on an airport or restricted landing area[,]" it "cannot take effect until submitted to the [Aeronautics Division] and . . . until approved by the [Aeronautics Division]." *Hanlon*, 89 Mass. App. Ct. at 397. It is undisputed that Stow's zoning bylaw prohibits

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15 In so ruling, Judge Foster noted, however:

> [t]he *Hanlon* decision may merit revisiting. The Appeals Court decided *Hanlon* without the benefit of argument from the Town of Sheffield, which did not file a brief or appear at oral argument. The analysis in *Hanlon* appears at odds with the understanding of the statute implicit in a series of decisions in the Appeals Court, the Superior Court, and this court, including *Garabedian v. Westland*, 59 Mass.App.Ct. 427 (2003); *Boch v. Edgartown Zoning Bd. of Appeals*, 23 LCR 175 (2015); *Goddard v. Congregation of the Sisters of Saint Joseph*, 15 LCR 592 (2007); *Farrar v. Zoning Bd. of Appeals of Spencer*, No. 91-2430, 2004 Mass.Super. LEXIS 121 (Mass.Super.Mar.16, 2004); and the decision overruled in *Hanlon*, *Hanlon v. Sheffield Zoning Bd. of Appeals*, 23 LCR 181 (2015).

Roma, III, Ltd. v. Christopher, Land Court Case No. 15 MISC 000074 (RBF), 2016 WL 6138651, at *8 n.3 (Oct. 19, 2016).

16 *See* n.15, *supra*, and the discussion in my prior order in this case dated June 8, 2016 (granting plaintiffs' motion for preliminary injunction).

uses not referenced therein, and that the bylaw contains no provision regarding the use or operation of aircraft on an airport or restricted landing area. Such use is therefore prohibited by the bylaw. It is also undisputed that the Aeronautics Division has not approved Stow's bylaw, and, in fact, has explicitly stated that it did *not* approve it. Because Aeronautics Division approval of the bylaw is a condition precedent to its enforceability, and, because no such approval has been granted, the ZBA erred in upholding the cease-and-desist order. *See id.*

Stow contends that because its bylaw predates the addition of Paragraph Five to § 39B, the bylaw is exempt from that paragraph's Aeronautics Division approval requirement. I disagree. Whether Stow's prohibition of airport and landing field use was *ever* a valid municipal action is tenuous, at best, because its bylaw prohibiting such use predates Paragraph Five, which the Appeals Court has ruled is the "only statutory basis for a town's regulation of private noncommercial landing areas." *Hanlon*, 89 Mass. App. Ct. at 395. Even assuming the bylaw was at some point valid, Stow's characterization of the application of Paragraph Five to Stow's bylaw as impermissibly "retroactive" is not persuasive.[17] At this point, the question of enforcement of the bylaw with respect to the Collings property is solely prospective.

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17 The Appeals Court rejected a similar argument in *Pearson v. Town of Plymouth*, 44 Mass. App. Ct. 741 (1998). In *Pearson*, a Town of Plymouth bylaw prohibited certain airplanes from operating from or upon any pond in the town, except in an emergency. *See id.* at 741. After the bylaw was approved, the legislature added a provision to G.L. c. 131, § 45 (the "Great Pond Statute") that required municipalities to first obtain the aeronautics commission's approval of laws regulating the use and operation of aircraft equipped with floats on great ponds. *See id.* at 742. The plaintiff requested a declaration that the town could not enforce the bylaw. *See id.* The town contended that it would be an impermissible "retroactive" application of the statute if it was applied to its bylaw. *See id.* The court disagreed, opining that "nullification of the bylaw would not be a forbidden 'retroactive' application of the [statute]" and that the only issue was whether the bylaw was enforceable without the commission's approval after the legislature adopted that requirement. *Id.* The court noted that even if it construed the requested relief as "retroactive," such an application of the statute would be permissible because the statute was remedial and no prior exercise of a vested right would be adversely affected (the complaint did not, for example, seek relief from a penalty or fine). *See id.* The court concluded that the legislature intended to preclude local entities from

Conclusion

For the foregoing reasons, plaintiffs' second motion for summary judgment (based on *Hanlon*) is **GRANTED**, and plaintiffs' first motion for summary judgment (based on *res judicata*) is **DENIED**. The ZBA's decision is **VACATED**, and the matter is **REMANDED** back to the ZBA for a decision consistent with this decision.

Judgments shall enter accordingly.

SO ORDERED.

Keith C. Long, Justice

Dated: 7 November 2016

unilaterally regulating aircraft with floats on great ponds, and thus declared Plymouth's bylaw, to the extent it did so, invalid. *See id.* at 744-745.

Similarly, in these cases, the sole issue is whether Stow's bylaw, which has not been approved by the Aeronautics Division, is presently enforceable against the plaintiffs. Under *Hanlon*, it is not.

Accompanying the first recommendation of the Massachusetts Aeronautics Commission (House, No. 9). Transportation.

The Commonwealth of Massachusetts

IN THE YEAR ONE THOUSAND NINE HUNDRED AND EIGHTY- FIVE

AN ACT Regulating the Use of Private Aircraft Landing Areas;

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

~~SECTION 1.~~ Section 39B of chapter 90 of the General Laws as ~~amended by chapter 505 of the acts of 1948~~ is hereby ~~further~~ amended by ~~inserting at the end thereof~~ adding (inserting) after the penultimate paragraph the following paragraph:-

~~Notwithstanding any other provisions of this section,~~ a city or town in which is situated the whole or any portion of an airport or restricted landing area owned by a person may, as to so much thereof as is located within its boundaries, make and enforce rules and regulations relative to the use and operation of aircraft on said airport or restricted landing area, ~~provided, however, that~~ such rules and regulations, ordinances or by-laws shall be submitted to the commission and ~~providing for such operation~~ shall not take effect until ~~shall first be~~ approved by the commission.

ADD. 41

NOTE. -- Use ONE side of paper ONLY. DOUBLE SPACE. Insert additional leaves, if necessary.

702 CMR 2.00: CONSTRUCTION AND APPLICATION

Section

2.01: Definitions

(1) As used in 702 CMR, the following words shall have the meanings set forth in 702 CMR 2.01, unless otherwise required in 702 CMR 2.00

Accident. An aircraft accident as defined in 49 C.F.R. § 830.2

Acrobatic Flight. Maneuvers intentionally performed by a pilot of an aircraft involving an abrupt change in its attitude, an abnormal attitude or an abnormal acceleration, not including turns or maneuvers necessary to normal flight.

Administrator. Administrator of the division. Administrator shall have the same meaning as the term "Director" pursuant to M.G.L. c. 90, § 35.

Aircraft. An aircraft as defined in M.G.L. c. 90, § 35 including, without limitation, an unmanned aerial vehicle.

Air Meet. A scheduled event or events consisting of a contest, demonstration or exhibition involving aircraft in flight, conducted mainly for the interest of either spectators or contestants.

Balloon. An aircraft, excluding moored balloons, without mechanical means of propulsion, the support of which is derived from lighter-than-air gas.

Certificate of Authorization. A Certificate of Authorization issued by FAA that permits the holder to operate one or more unmanned aerial vehicles.

Commonwealth. The Commonwealth of Massachusetts.

Division. The Aeronautics Division of MassDOT. Division shall have the same meaning as the term "Commission" pursuant to M.G.L. c. 90, § 35.

FAA. The Federal Aviation Administration.

Heliport. Any landing area used for the take-off and landing of helicopters.

MassDOT. The Massachusetts Department of Transportation.

Operator. A person who engages in the "Operation of aircraft", as defined by M.G.L. c. 90, § 35.

Pilot. A person operating an aircraft in flight.

Private Restricted Landing Area. A landing area that is used solely for non-commercial, private use by the owner or lessee of the landing area.

To Pilot. To be in command of the aircraft during takeoff, in flight, or landing.

Unmanned Aerial Vehicle. An aircraft operated without the possibility of direct human intervention from within or on the aircraft.

Vicinity of Airport. The airspace below 1500 ft. above the surface and within 10,000 ft. horizontally of the center of an airport.

(MA REG. # 1316, Dated 7-1-16)

702 CMR 5.00: AIRPORTS, HELIPORTS AND RESTRICTED LANDING AREAS

Section

5.01: Applications

Pursuant to M.G.L. c. 90, § 39B, no one may establish, alter, activate or deactivate an airport, heliport or restricted landing area without first obtaining a certificate of approval issued by the division pursuant to 702 CMR 5.02 through 5.06.

5.02: Scope

702 CMR 5.02 does not apply to:

(1) private restricted landing areas, provided that any person constructing or maintaining a private restricted landing area must so inform the division in writing, and construct and maintain such landing area in accordance with all applicable standards and in such a manner as shall not endanger public safety;

(2) airports, heliports or restricted landing areas operated by the Massachusetts Port Authority pursuant to St. 1956, c. 465; and

(3) airports, heliports or restricted landing areas operated by the United States government including military airports.

5.03: Application Requirements

(1) The applicant shall set forth the general purpose or purposes for which the airport, heliport or restricted landing area is to be established and ensure that the site, and its use, conform to all applicable safety standards.

(2) All applications for an airport, heliport or restricted landing area must be submitted at least 90 days prior to the date the applicant intends to use the site as an airport, heliport or restricted landing area.

(3) Applicants proposing an airport, heliport or restricted landing area or alterations to an airport, heliport or restricted landing area that is not located on property owned or controlled by the applicant or is partially located on property owned or controlled by others, must obtain authorization from the owner or person in control of the property to use the property. The signature of the owner or person in control of the property must be notarized. Such written, notarized authorizations must expressly authorize the applicant to apply for the activities set forth in the application.

(4) Information required in the application includes the address, a description of the airport, heliport or restricted landing area, the general purpose or purposes for which the airport, heliport, or restricted landing area is to be established, the dates and times of the proposed use, a site plan drawn to scale, and a written plan addressing safety and security.

(5) Applications for an airport, heliport, or restricted landing area must be accompanied by a fee in the amount determined by the division.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

LAND COURT DEPARTMENT
OF THE TRIAL COURT
CASE NO. 15 MISC 000074 (RBF)

ROMA, III, LTD.,

Plaintiff,

v.

CHARLES W. CHRISTOPHER,
FREDERICK C. FRITHSEN,
LARS-ERIK WIBERG,
MICHAEL BACE, and
TACY D. SAN ANTONIO, as they are
MEMBERS of the TOWN OF
ROCKPORT BOARD OF APPEALS,

Defendants.

AFFIDAVIT OF JEFFREY DECARLO, ED.D, PMP, ATP

I, Jeffrey DeCarlo, hereby on oath depose and state as follows:

1. I am Administrator of the Massachusetts Department of Transportation's ("MassDOT") Aeronautics Division. MassDOT is a single, integrated transportation authority, comprised of district operating divisions, including Aeronautics, Highway, Registry, and Rail & Transit. The Aeronautics Division ("Division") continues to administer the statutory mission and functions previously performed by the former Massachusetts Aeronautics Commission ("MAC"), including the administration and enforcement of G.L. c. 90, §§ 35-52. See also St. 2009, c. 25, "An Act Modernizing the Transportation Systems of the Commonwealth."
2. As Administrator, I am responsible for promoting aviation within the Commonwealth as legislatively mandated, as well as the implementation of all related statutory and regulatory requirements.
3. G.L. c. 90, § 39B states as follow:

"A city or town in which is situated the whole or any portion of an airport or restricted landing area owned by a person may, as to so much thereof as is located within its boundaries, make and enforce rules and regulations relative to the use and operation of aircraft on said airport or restricted landing area. Such rules and regulations, ordinances or by-laws shall be submitted to the commission [now MassDOT] and shall not take effect until approved by the commission [MassDOT]."

4. The Division interprets the above-quoted phrase as meaning that a municipality's attempt to rely upon its zoning bylaw to regulate aircraft is permissible, but only if the bylaw has been submitted to and approved by the Division pursuant to § 39B. The Division's position concerning the proper interpretation of G. L. c. 90, § 39B is set forth in greater detail in the true and accurate copy of its *amicus curiae* brief filed in Hanlon v. Town of Sheffield, Massachusetts Appeals Court Docket No. 15-P-799, attached hereto as **Exhibit 1.**

5. Only the Administrator, as determined by the Legislature, may consider and evaluate the competing interests of public safety and the development and promotion of aviation throughout the Commonwealth, and, with those interests in mind, appraise any local bylaw directly or indirectly prohibiting the use and operation of aircraft.

6. The Division's position is that any bylaw "relative to the use and operation of aircraft" is unenforceable unless approved in writing by the Administrator.

7. The Division has not promulgated any formal review criteria under G. L. c. 90, § 39B. The decision whether to approve a local bylaw or ordinance is left up to the judgment of the Administrator. However, in making his decision, the Administrator is guided by the legislative directive that animated the 1985 Amendment to § 39B, St. 1985, c. 30, to consider both: (a) the public interest and safety; and (b) the advancement and promotion of aeronautics in the Commonwealth.

8. The appropriateness of bylaws and ordinances, when assessed under this dual legislative mandate, is determined on a case-by-case basis. Nevertheless, generally-speaking, the Administrator, with the advice of counsel, looks unfavorably upon bylaws that, while having no provision purporting to regulate the use or operation of aircraft, nonetheless state that the operation or use of aircraft is not a permitted use in any zoning district in the town, and, many times, go on to conclude that "[a]ll uses not specifically named in the text of the bylaw are prohibited." Attached hereto as **Exhibit 2** and **Exhibit 3** are true and accurate copies of approval and denial letters, respectively, for local laws reviewed pursuant to G. L. c. 90, § 39B.

9. As a result of the Hanlon decision, the Division has recently began a review of all local requests for review received by MAC and the Division since the 1985 Amendment, which created the review authority of MAC, now the Division over local bylaws and ordinances. As of the date of this affidavit, the Division has reviewed approximately 36 local laws regulating the operation and use of aircraft and, out of that total, has approved approximately 3 and denied approval of approximately 11, with the remaining requests either withdrawn or action not taken for various reasons.

10. The Division is unable to locate any submission from the Town of Rockport requesting review and approval of any bylaw pursuant G. L. c. 90, § 39B.

Signed under the pains and penalties of perjury this 15th day of August, 2016.

Jeffrey DeCarlo

JOHN R. HANLON, JR. vs. TOWN OF SHEFFIELD & others. [Note 1]

89 Mass. App. Ct. 392

March 7, 2016 - May 13, 2016

Court Below: Land Court

Present: Kafker, C.J., Katzmann, & Grainger, JJ.

Zoning, Private airstrip, Validity of by-law or ordinance. Statute, Construction. Municipal Corporations, By-laws and ordinances.

This court concluded that the word section in the fourth paragraph of G. L. c. 90, § 39B, refers to those provisions of that section in effect at the time the fourth paragraph was added to the statute in 1946, but not to the fifth paragraph that was added to the statute in 1985, such that any part of a town zoning bylaw purporting to regulate the use and operation of aircraft on an airport or restricted landing area could not take effect until submitted to and approved by the aeronautics division of the Department of Transportation. [394-397]

CIVIL ACTION commenced in the Land Court Department on March 21, 2012.

The case was heard by Howard P. Speicher, J., on a motion for summary judgment.

Alexandra H. Glover for the plaintiff.

Peter Sacks, State Solicitor, for Department of Transportation, amicus curiae.

GRAINGER, J. The plaintiff John R. Hanlon, Jr., appeals from summary judgment entered in favor of the defendants, ruling that the town of Sheffield (town) was authorized to regulate the plaintiff's use of his property as a private noncommercial aircraft landing area notwithstanding the regulatory authority of the Massachusetts Department of Transportation aeronautics division (division). [Note 2] In reversing the

judgment we acknowledge that the motion judge was confronted, as are we, with statutory language

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in G. L. c. 90, § 39B, that undermines the evident purpose of the statute, and we note that this is an appropriate subject for corrective legislation. [Note 3]

Background. The facts are undisputed. The plaintiff owns approximately thirty-eight acres of land (property) in the town, containing the plaintiff's residence and a number of outbuildings suitable for storage of small airplanes. On the property, the plaintiff created a strip eighty feet wide by 1,250 feet long for takeoff and landing of airplanes and, since at least 2006, has operated aircraft from the property as a hobby. In 2006, the plaintiff registered the property with the Federal Aviation Administration as a helipad. Pursuant to G. L. c. 90, § 39B, fourth par., he also registered the property as a noncommercial private restricted landing area (PRLA) with the division. He neither sought nor received any approval from the town with respect to the PRLA.

The property is located in a rural district under the town zoning by-law. Section 3.1 of the by-law provides that land may not be "used except as set forth in the . . . Table of Use Regulations." The section further provides that "[a]ny . . . use of premises not herein expressly permitted is hereby prohibited." Although "commercial airfield" is listed as a prohibited use in rural districts, the Table of Use Regulations contains no mention of noncommercial or private airfields.

In a letter dated November 15, 2011, the town's building commissioner/zoning enforcement officer ordered the plaintiff to cease and desist from using the PRLA on the property as such use was not "set forth" in § 3.1 of the by-law, and was therefore prohibited. The plaintiff appealed the cease and desist order to the town zoning board of appeals (board),

which held hearings on four dates. [Note 4] The board upheld the cease and desist order, and the plaintiff appealed the decision to the Land Court. In the Land Court, the plaintiff both appealed the board's decision, see G. L. c. 40A, § 17, and sought a determination that the by-law provision was invalid, see G. L. c. 240, § 14A, insofar as it purports to regulate the use of the property for aircraft, because the town never submitted it to the division for approval. On the plaintiff's motion for summary judgment, the judge held in favor of the

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town, declaring the by-law provision valid and enforceable to prohibit the plaintiff's use of the property as a PRLA.

Discussion. The issue at hand is whether G. L. c. 90, § 39B, fifth par., read in conjunction with the section's preceding fourth paragraph, allows a municipality to ban noncommercial PRLAs without prior approval from the division. "We review questions of statutory interpretation de novo." Commerce Ins. Co. v. Commissioner of Ins., 447 Mass. 478 , 481 (2006). However, "[o]ur primary duty in interpreting a statute is to effectuate the intent of the Legislature in enacting it. . . . Where the meaning of a statute is not plain from its language, we consider the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Water Dept. of Fairhaven v. Department of Envtl. Protection, 455 Mass. 740 , 744 (2010) (quotations and citations omitted). In doing so, "[w]e give substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration enforcement." Commerce Ins. Co. v. Commissioner of Ins., supra.

Section 39B, added to the General Laws by St. 1946, c. 607, § 1, governs division approval of municipal airport sites and restricted landing areas and details the procedure for receiving a certificate of approval from the division. [Note 5] The fifth paragraph of § 39B, inserted by St. 1985, c. 30,

requires that a municipality making any rule, regulation, ordinance or by-law "relative to the use and operation of aircraft on said airport or restricted landing area," receive approval from the division prior to the rule's taking effect. The language of the fifth paragraph applies to all landing facilities; it does not distinguish between commercial landing areas and private noncommercial landing areas. [Note 6] Therefore, if the fifth paragraph is applicable in these circumstances, the town's

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cease and desist order is invalid, because the by-law provision on which it is based has not been approved by the division.

However, the fourth paragraph of § 39B, already in effect at the time the fifth paragraph was enacted, contains the following introductory clause: "*This section* shall not apply to restricted landing areas designed for non-commercial private use . . ." (emphasis added). Read literally, this wording exempts noncommercial private landing areas from every provision contained in all six paragraphs of § 39B, whether the provision was enacted at the same time or almost four decades after the fourth paragraph.

The application of the fourth paragraph to the fifth paragraph of § 39B creates a serious incongruity. The fifth paragraph is a legislative delegation to the division to approve or disapprove municipal ordinances and by-laws regulating an "airport or restricted landing area owned by a person." [Note 7] The statute as a whole contains no other provision that refers to any municipal power to regulate private noncommercial landing areas other than the language in § 39B, fifth par. The fifth paragraph allows for division review of such municipal rules and regulations, and thereby implies the permissibility of those rules and regulations in the first place.

As a result, were we to apply the exemption of the fourth paragraph of § 39B to the fifth paragraph, it would eliminate the only statutory basis for a

town's regulation of private noncommercial landing areas. Otherwise stated, our choice is to interpret the statute to require town regulation of private noncommercial landing areas to be subject to division approval or, alternatively, to declare that there is no basis for any municipal regulation at the outset. To avoid the latter outcome, we read the word "section" in the fourth paragraph to apply to the preceding paragraphs, but not to the fifth paragraph. See, e.g., Commonwealth v. Neiman, 396 Mass. 754 , 757-758 (1986) (use of "this section" in fourth paragraph of G. L. c. 94C, § 32A, held to apply only to immediately preceding subsection).

This interpretation resolves additional discrepancies with related sections of G. L. c. 90. For example, G. L. c. 90, § 39, as appearing in St. 1948, c. 637, § 10, sets forth the express legislative grant of "general supervision and control over aeronautics"

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to the division. This wording is difficult to reconcile with an unreviewable assignment of one portion of the same regulatory authority to cities and towns. General, not limited, "supervision and control" is delegated to the division specifically

"for the purpose of protecting and insuring the general public interests and safety, and the safety of persons receiving instructions concerning, or operating or using, aircraft and of persons and property being transported in aircraft, and for the purpose of developing and promoting aeronautics within the commonwealth . . . ."

G. L. c. 90, § 39, fourth par., as amended by St. 1946, c. 583, § 3. Likewise, § 40 of c. 90, as amended by St. 1946, c. 582, § 1, reinforces the breadth of jurisdiction delegated to the division by the Legislature. The division is authorized and directed to "foster air commerce and private flying within the commonwealth and for such purpose shall: (a) encourage

the establishment of airports and air navigation facilities and the development of education in aeronautics." G. L. c. 90, § 40.

On the infrequent occasions when we are presented with this level of statutory incongruity, our cases instruct "that we should not accept the literal meaning of the words of a statute without regard for that statute's purpose and history." Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837 , 839 (1986). Libertarian Assn. of Mass. v. Secretary of the Commonwealth, 462 Mass. 538 , 551 (2012). We "are not foreclosed by faulty or imprecise draftsmanship from giving statutes and ordinances a practical and reasonable construction." Advanced Dev. Concepts, Inc. v. Blackstone, 33 Mass. App. Ct. 228 , 232 (1992). Cf. Reade v Secretary of the Commonwealth, 472 Mass. 573 , 584 (2015).

We therefore conclude that this case "presents one of those rare instances in which a court must overcome its reluctance to supply word or words which were not employed by the Legislature . . . in order to render a statute intelligible and so effectuate its obvious intent." Watros v. Greater Lynn Mental Health & Retardation Assn., Inc. 421 Mass. 106 , 114 n.3 (1995) (quotation and citation omitted). Accordingly, we interpret the word "section" in the fourth paragraph of G. L. c. 90, § 39B, to refer to those provisions of the § 39B in effect at the time the fourth paragraph was added to the statute in 1946, but not to the fifth paragraph, here at issue, which was added to the statute in 1985, almost four decades later. As a result, any part of § 3.1 of the town zoning

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by-law that purports to regulate "the use and operation of aircraft on [an] airport or restricted landing area" cannot take effect until "submitted to the [division] and . . . until approved by the [division]."

The judgment is reversed and the matter is remanded to the Land Court for entry of a new judgment consistent with this opinion.

So ordered.

FOOTNOTES

[Note 1] Zoning board of appeals of Sheffield and building inspector/zoning enforcement officer of Sheffield.

[Note 2] The Transportation Reform Act of 2009, St. 2009, c. 25, transferred to the division the powers and duties of the former Massachusetts Aeronautics Commission and additionally changed the definition of "Commission" in the statute to the division. G. L. c. 90, § 35(m). For the sake of consistency, we refer only to the division regardless of which entity was in power at the time.

[Note 3] We acknowledge the amicus brief and participation in oral argument on behalf of the plaintiff by the State Solicitor.

[Note 4] Hearings were held on January 19, 2012, January 26, 2012, February 6, 2012, and February 28, 2012.

[Note 5] The first version of the statute passed in 1946 consisted of current paragraphs 1, 3, 4, and 6. Two years later, the second paragraph was added. In 1985, thirty-nine years thereafter, the fifth paragraph was added.

[Note 6] The full text of the fifth paragraph states:

"A city or town in which is situated the whole or any portion of an airport or restricted landing area owned by a person may, as to so much thereof as is located within its boundaries, make and enforce rules and regulations relative to the use and operation of aircraft on said airport or restricted landing area. Such rules and regulations, ordinances or by-laws shall be submitted to the [division] and shall not take effect until approved by the [division]."

[Note 7] See G. L. c. 90, § 35(o), as amended by St. 1946, c. 507 (defining "Person" as "any individual, firm, partnership, corporation, company, association, joint stock association; and [including] any trustee, receiver, assignee or other similar representative thereof"). This simply details varieties of private ownership.

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